LEO STRAUSS

Grotius, *On the Law of War and Peace*

A course given in the autumn quarter 1964 in the

Department of Political Science, University of Chicago

Edited and with an introduction by Steven Forde

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Grotius' *On the Law of War and Peace*

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Leo Strauss taught this seminar on Hugo Grotius' *On the Law of War and Peace* in the fall quarter of 1964. This seems to have been the only course he ever taught on Grotius. Grotius, moreover, plays a negligible role in Strauss's writings. One might conclude that this seminar is little more than a footnote in Strauss's legacy, that however illuminating it may be as a study of Grotius, it can be of no great importance for understanding Strauss. On top of this, students who attended the class in 1964 were known occasionally to call their subject "atrocious Grotius."[i] I was not among those students, but as one who has spent his time in the salt mines of Grotius' book—over eight hundred pages of dense and highly pedantic prose—I have more than a little sympathy with their plight. Still, it seems to me that we should not dismiss this sole in-depth treatment of Grotius in Strauss's *oeuvre*. Indeed, we should treat it as a rare find.

The case for doing so I would locate first, with only mild irony, in Strauss's very silence on Grotius in his published work. As Strauss points out in this seminar (*e.g.*, session 1), conventional readings of the history of political philosophy place Grotius in a prominent position, as a pivotal figure in the development of modernity. Strauss concedes, indeed emphasizes, in this seminar that Grotius pioneered some of the most distinctive ideas of modern political philosophy a generation before Hobbes.[ii] Government, according to Grotius, is a product of a contract among citizens. Its fundamental task is the maintenance of order and the safeguarding of individual rights, not the promulgation of religion or enforcement of morality more broadly. Individual right forms the most urgent or solid part of morality, the only part of it that is compulsory or that belongs to natural law proper. This right, moreover, is rooted in preservation and interest. Grotius' reduction of natural law to the protection of individual rights was historically momentous. As Strauss notes, it "gave natural law that political effectiveness it had in the eighteenth century," the century of the American Founding, among other things (session 1). It also had the effect of separating law and government from morality more broadly understood, a separation that underpins the modern notions of individual liberty and limited government. Grotius' work laid the foundation for liberal political philosophy and political practice.

Grotius is not the true founder of modern natural right, Strauss finds, because he failed to break decisively with the older tradition, the older understanding of natural right. His was a "quantitative," not a "qualitative" change; he failed or refused to take the revolutionary step that Hobbes did (session 1). Although individual rights are the bedrock of morality for Grotius, they are not the whole of morality. Relying on Cicero and other classical authorities, Grotius asserts that another part of morality is grounded in human sociability

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[i] I owe this detail to Abram Shulsky, who was one of the students in the class.

[ii] Grotius published *On the Law of War and Peace* (henceforth *JBP*) in 1625. He lived long enough to read some of Hobbes's earliest writings.

and (sociable) rationality. This part of morality, though not strictly compulsory, is unambiguously higher for Grotius, as for the ancients. Moreover, though government's fundamental *raison d'être* is to safeguard individual right, Grotius argues that it may choose also to promote the higher reaches of morality. Because government gains its stature in part from the higher, sociable part of human nature, it has a higher standing than individuals. Despite its origin in contract, sovereignty for Grotius is more than the sum of the rights and powers of the individuals who brought it into being. In accordance with this, as Strauss points out, Grotius does not by and large call the pre-civil condition the "state of nature," but the "primitive" state; it cannot properly be called man's *natural* state, insofar as civil society is necessary to develop the higher, sociable part of human nature (sessions 3, 5, 6, and 9).

Thus, though Grotius pioneered many of the innovations on which the founders of modern natural right based their philosophies, he retained, or attempted to retain, significant elements of classical inspiration. Grotius saw the advantageous solidity of the new interest-based portion of right, but he still viewed it as morally "low." He used it to ground a moral sphere of individual rights in the modern sense but paired it with a parallel sphere of duty, reflecting the higher but less obligatory part of morality. Strauss finds this to be an untenable combination of conflicting ideas. In terms of the fundamental dichotomy between ancient and modern that Strauss argues for throughout his *oeuvre*, Grotius tries to have it both ways. For Strauss, this is not only a failure to make the fundamental break that Hobbes made soon afterward, it is a failure on the part of Grotius to see that the new, lower ground he establishes for politics and morality is incompatible with his attempt to retain something of the higher. This becomes visible, Strauss suggests in this seminar, in certain problems presented by Grotius' thought. The completion of Grotius' project would require, for example, the drawing of a clear line between the lower and the higher and defining a specific sphere in which each is dominant, or at least providing a rule of adjudication in cases where they conflict. Grotius maintains on the one hand that the former are of higher rank, capable of overriding individual right in certain circumstances, while on the other hand that the latter alone are the province of "law properly so called."[iii] Strauss is skeptical that Grotius has succeeded in showing how this tension is to be resolved (e.g., sessions 1, 10.)

The argument Strauss makes in this seminar for the ultimate incoherence of Grotius is implicitly an elaboration and defense of his view that the ancient and the modern constitute two fundamentally opposed, and irreconcilable, approaches to political philosophy.[iv] For this reason, one could call Strauss's omission of Grotius from his published works a significant, and eloquent, silence. As this seminar illustrates, that silence reflects Strauss's fundamental departure from previous accounts of the history of political philosophy. His break concerns not only the list of authors to be included in the canon, but the fundamental issues at stake in political philosophy. It is probably necessary to add that Strauss also differs from conventional accounts of the history of

[iii] *JBP* Prolegomena §7; cf. §10; transcript session 1.

[iv] "Ancient" in this context is shorthand for the Socratic tradition: Plato, Aristotle, and their followers, such as Cicero. As Strauss points out in this seminar (session 4), ancient non-Socratics such as the sophists or the Epicureans are not in this category.

political philosophy on the question whether intellectual coherence is required for an author to be considered a principal figure in that history. Grotius emerges in this seminar as an important figure, but transitional rather than pivotal. Though not in "the same league" as thinkers such as Bacon or Hobbes, Strauss does not deny that we can learn much from Grotius (sessions 5, 1). Comparisons of Grotius with Cicero, Aristotle, Aquinas and modern thinkers abound in this seminar and shed light on Strauss's view of what is distinctively "modern," and a host of other deeply philosophical issues (see, for example, the discussion at the beginning of session 14).

The dialogue between Strauss and Grotius, to which this seminar invites us, thus involves, among other things, the plausibility, or viability, of Grotius' two-tiered or part-modern and part-ancient moral philosophy. Grotius, being a lawyer, was interested of course in that part of right embodied in the specific duties and entitlements of positive law. He was the first to find such entitlements in natural right, or at least the first to systematically develop a theory of natural right placing "subjective" or individual right at its core, a sphere of inviolability surrounding the person (*cf.* session 2). We might say that Grotius, in the spirit of modernity, wanted to define and protect this moral sphere, which is rooted in self-interest and preservation, without reducing all of right to interest and preservation as Hobbes later did. In this, again Grotius took Cicero as an authority, for whom interest and preservation grounded a legitimate part of morality, with rational sociability grounding its higher reaches.[v] On Grotius' behalf we might ask why, then, we cannot accord to him the same privilege we grant to Cicero, and indeed to Aristotle and Aquinas, all of whom combined higher and lower spheres in their moral theories? Could Grotius not make a case that human nature has both a legitimately self-interested and a sociable side, and that any moral theory must take account of both of these?

Strauss's position in this seminar seems to be that Grotius' synthesis is untenable due to the ways in which it differs from the classical synthesis. One thing that Cicero and the classics did not do was define a sphere of individual "rights" rooted in interest. Their morality was fundamentally one of duty—even the portion rooted in preservation—with the higher moral sphere unambiguously of greater dignity and importance. For them, there is no sense in which the lower sphere represents the center or the core of natural right, though it represents a legitimate and in some sense more urgent part of natural right. The classics did not delineate with precision where self-concern could predominate, and where it must give way to higher concerns, any more than Grotius does. They regarded this as a matter of prudence, incapable of strict definition (*e.g.*, sessions 1, 2, 10, 11). But Grotius, in addition to redefining the lower sphere as "law properly so called," asserts that it can be systematically codified, reduced to an art (Prolegomena §30; *cf.* session 10,). This would seem to place on him a burden of drawing the line between lower and higher spheres with a precision that was not incumbent on the classics.

Grotius' intellectual project of combining contrary intellectual currents is seen equally clearly in his treatment of the law (or right: Latin *ius*) of war and peace. This of course is his main theme in the text for this seminar, and a principal theme of the seminar itself. Grotius argues that this law has two distinct sources: the law of nature, and the "volitional

[v] See Cicero *On Duties* 1.4-5; 3.10.42.

law of nations," based on the agreement of nations, or at least of "the better sort" of nations.[vi] Law in a wider sense has the same two roots, what were traditionally called natural law and human law. At the outset of his work, Grotius claims for himself the distinction of being the first to attend sufficiently to this bifurcation in the sources of law. This is part of his claim to be the first to reduce jurisprudence to an art: of the two sources, only natural law is capable of systematic or philosophic treatment (Prolegomena, §§30-31). In addition to systematizing the natural law, Grotius undertakes to catalogue much of the volitional law (especially as it relates to war). He also addresses, naturally, the question of the relation between the two sources or sorts of law. Grotius makes the remarkable argument that the volitional law, based on human consent, may not only supplement natural law but in some cases even override it. This, as Strauss points out, is something that would not be allowed by the thinkers of the modern natural law tradition that followed, for whom indefeasible natural law became the very benchmark of legal and political legitimacy. This is another sign that Grotius represents a "transitional stage" (session 7).

Certain supplements to natural law would be countenanced by the later thinkers. Grotius maintains that human volitional law, either municipal or international, may impose greater restrictions than does natural law itself. Polygamy is allowed by natural law, for example, but municipal law may mandate monogamy, which Grotius asserts is an improvement on natural law (*JBP* 1.2.6.1). Similarly, poison as a method of killing in war is allowed by natural law but, Grotius claims, has been banned by the volitional law of nations (*JBP* 3.4.15.1). These kinds of supplements, tightening the law of nature as it were, would be countenanced by the likes of Hobbes and Locke, at least domestically (*v*. Locke, *Second Treatise*, §§81, 136). Much more momentous is Grotius' claim that, on the other side, human law may relax the requirements of natural law, permitting things that are forbidden by that law, that are immoral or criminal by nature. His principal example is the volitional law of war, according to which both combatants are deemed to wage war legitimately so long as they abide by such formal requirements as a declaration of war made by the sovereign power. Under natural law, only combatants whose cause is just are authorized to wage war (*JBP* 3.4.3). According to Grotius, the consent of nations has suspended this provision of natural law, granting the rights of war, including possibly sovereignty over conquered peoples, to unjust as well as just combatants (*JBP* 3.8.1). "Legal war" replaces "just war," by the operation of human will.

Strauss raises questions about this not simply on moral grounds, but on philosophical grounds. Grotius' motivation is blameless enough. He wishes on the one hand to allow nations collectively to suspend impractical demands of the law of nature (how do third parties determine with certainty which side in a conflict is the unjust party?), and on the other to prevent greater violence that might follow from the uncompromising enforcement of justice (endless cycles of reprisals, perhaps). Strauss acknowledges this intention of Grotius, and gives him due credit for the greater humanization of war that

[vi] *JBP* 3.4.15.1 (Book 3, chapter 4, section 15, paragraph 1. Here and throughout the seminar transcript I will use this standard citation format).

occurred in the centuries that followed.[vii] As with the case of Grotius' combination of lower and higher realms of morality, though, Strauss doubts that Grotius has drawn a principled line between allowable suspensions of justice and those that are not supportable (session 11). First laying out the demands of natural law with precision, then allowing breaches of it without any clear limitations, Strauss charges, creates a "great weakness" in the very notion of natural right, and may undermine its authority in the eyes of mankind (sessions 10, 11). For this reason, Strauss suggests that Rousseau is more responsible than Grotius for the humanization of warfare that took place in subsequent centuries (session 12). Grotius would doubtless plead that it is necessary to allow exceptions to the natural law to prevent it from collapsing under the weight of real-world problems, most visible in war, that require scaling back the strict demands of justice. Better to give defined permissions, he might say, than to allow simple lawlessness: the consensual law of nations gives the law of war the flexibility that it needs to be of use in practice. To this Strauss counters that it is Grotius who has painted himself into this corner. The classics knew that human law could not practicably enforce all of morality or natural right. They did not delineate exactly where the line of practicability lay, since that would vary with circumstances and once again is the province of prudence (*e.g.*, session 11). Grotius, however, has argued that human law is in principle limited to enforcing the minimal or lower part of morality—this is what makes him a forerunner of the liberal argument for limited government. One result, Strauss maintains, is that he is obligated to be more precise in this matter (session 11). The older natural law tradition (culminating in Thomism) had flexibility built into it, as it was rooted in a few general principles whose application could vary with circumstances. Grotius' proclamation that natural law may be made a true art or science forecloses for him that solution (session 12). This set of problems, we should note, stems not from Grotius' attempt to straddle ancient and modern but from the specifically modern elements of his thought. To that extent, this part of Strauss's critique of Grotius would seem to be a critique of modern natural right per se (as is suggested in session 11).

Grotius' argument takes one final, perplexing turn: after permitting multiple suspensions of natural law by the consent of nations, Grotius near the end of his work reverses course, and withdraws from combatants "nearly all the privileges which I seemed to grant, yet did not grant to them" (*JBP* 3.10.1.1). What follows are essentially exhortations not to take advantage of the suspensions of justice that the volitional law of nations grants to combatants, to hold oneself to a higher moral standard. Grotius, once again, is clearly motivated by a desire to render war a less barbaric institution, but his procedure highlights the ambiguous relation of the volitional law of nations, with its permissiveness, to natural law proper. Strauss concludes that, despite his good intentions, Grotius' project of humanizing is "inadequately carried through," in part because of his ambivalence on the ultimate relation of the virtues of humanity, right strictly speaking, and volitional law (sessions 12, 13, 14).

[vii] Sessions 12, 13. Robert Howse points to this part of Strauss's teaching in the Grotius seminar, and fits it more broadly into Strauss's humanitarian teaching as a "man of peace." Howse, *Leo Strauss, Man of Peace* (Cambridge: Cambridge University Press, 2014).

To students who complained to him about "atrocious Grotius," Strauss replied that it is eminently worth one's while to look at an author like Grotius, despite his lack of grace as a writer and despite whatever shortcomings he may have as a thinker, for he raises questions of great significance and forces us to think about them. As Strauss says in regard to his own activity at one point, "teaching is sowing" (session 13), and the seeds of thought in Grotius are most fertile. Whatever we may say of Grotius' consistency, then, or his ultimate standing as a philosopher, this seminar provides a vehicle for thinking through many of the deepest, and thorniest, problems of political philosophy.

* * *

For those interested in Leo Strauss's politics ("politics" in the ordinary or retail sense), there are some points of interest in this course transcript. The fall of 1964 witnessed the campaigns for the American presidency of Democratic nominee Lyndon Johnson and Republican Barry Goldwater. This was a dramatic and pivotal event in American political history. Johnson won in a landslide in the November election, but the nomination of Goldwater marked the rise of a new, stauncher form of conservatism in the Republican party, and the two candidates presented starkly opposed political visions. Among the issues in the campaign were domestic civil rights, and war and foreign policy. This was the height of the Cold War, and American soldiers were in Vietnam. The time was very ripe for a consideration of justice in war and international politics, and Strauss makes numerous allusions to international events of the period by way of illustration. His comments betray both a concern to minimize the barbarity of war and the amorality of international politics, and a "realist" sense that these will never be completely eliminated.[viii] Strauss makes only a few references to the presidential campaign during the seminar, and in none of them does he take sides in the contest. At the beginning of session 3, Strauss speaks of conservatism broadly, noting the split in American conservatism between what are today called "economic" and "social" conservatives, the latter being concerned more with social morals. He notes that Goldwater has spoken from both perspectives in his campaign. Regarding his own views, Strauss tells his students, disarmingly, "[f]or crude purposes, I have always called myself a conservative, if not a reactionary, because I am not afraid of words." The labels are "crude" because the contemporary categories of "liberal" and "conservative" very imperfectly capture a position rooted in classical thought. For, among other things, present-day liberals and conservatives share a devotion to individual liberty in the distinctively modern sense (session 2). In some respects, Strauss points out, the classical position does align with the social conservatives of today inasmuch as classical thought took the proper moral formation of citizens to be a key function of politics (session 4). At the same time, one who adhered to a premodern political philosophy might quite literally be called reactionary, though not in the sense the term is usually taken. Strauss applies the label "reactionary" to Jonathan Swift, who championed the ancients over the moderns in his "Battle of the Books" and *Gulliver's Travels* (session 4). In session 3, Strauss calls the Civil Rights Act "the most important political issue in the country." In connection with

[viii] *E.g.,* sessions 4, 14. Howse discusses this balance in Strauss's thinking in some detail (*Man of Peace*, 150, 156, 162).

that Act, he says that it is typical of the liberal position to insist on the implementation of justice immediately, whereas conservatives may be more reticent. Conservatives, that is, might see a need to delay justice temporarily in view of the practical limitations of politics (session 3; *cf.* session 4; session 9).

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NOTE ON TEXT AND TERMINOLOGY

The text of Grotius assigned in the class was the translation by Francis W. Kelsey, first published by the Carnegie Endowment for International Peace in 1925. This translation has been reissued numerous times by various publishers, including a Bobbs-Merrill facsimile edition in 1962 which was probably the book ordered for this course.[ix] As of this writing, this translation is available online at http://www.lonang.com/exlibris/grotius/. This online edition lacks the notes and marginalia of Grotius' original Latin text which are included in the print editions. Grotius' Latin text was published by Carnegie in 1913, and is available online at http://www.google.com/books?id=Z0MwAAAAYAAJ. Strauss refers regularly in the seminar to a commentary produced by Johann Friedrich Gronovius in 1660. This commentary took the form of extensive notes to a Latin edition of Grotius' book, and to my knowledge has never been translated into English.

On the Law of War and Peace (de Jure Belli ac Pacis) is divided into a *Prolegomena* and three Books. The *Prolegomena* is divided into standardized paragraph numbers, and is cited that way in this transcript. Each Book has a number of chapters; each of these is divided into subsections, and most of the subsections in turn are divided into numbered segments. Thus the standard citation for most passages in Grotius, which I have followed in my annotations, contains four numbers separated by periods (e.g., 2.23.13.3). The terminology Strauss adopts in the seminar, which is crucial to following his place in the text, is to call the subsections of chapters "paragraphs," and the segments of those, "sections" (session 3). He did not always follow this terminology, however, so I have altered the transcript in those few places where he deviated from it to maintain consistency.

The original tape recording of the class no longer exists, so there is no means of checking the original audio in cases where the transcriber typed "inaudible" or seems to have transcribed erroneously. I have tried to reconstruct the original where possible, footnoting the emendations. Where my own guess would be no better than the reader's, I have simply left the "inaudible" as it appears in the typescript.

[ix] Hugo Grotius, *The Law of War and Peace*, translated by Francis W. Kelsey, with the collaboration of Arthur E. R. Boak, Henry A. Sanders, Jesse S. Reeves, and Herbert F. Wright (Indianapolis: Bobbs-Merrill, 1962).

The edition assigned for the course was probably Grotius, *On the Law of War and Peace*, trans. Francis W. Kelsey (Indianapolis: Bobbs-Merrill, 1962). (See the editor's "Note on Text and Terminology" above.)

This transcript was edited by Steven Forde with assistance from Philip Bretton.

This transcript sees an unusual, for the Strauss course transcripts, degree of editorial insertions, each of which is marked with square brackets. The original transcript contains a high incidence of likely mistranscriptions and "inaudible"s. The editor has reconstructed the substance of both Strauss's comments and those of the students based upon context, reference to the text, and inference. As the editor notes at the end of his introduction: "The original tape recording of the class no longer exists, so there is no means of checking the original audio in cases where the transcriber typed "inaudible" or seems to have transcribed erroneously. I have tried to reconstruct the original where possible, footnoting the emendations. Where my own guess would be no better than the reader's, I have simply left the 'inaudible' as it appears in the typescript."

For general information about the history of the transcript project and the editing guidelines, see the general headnote to the transcripts above.

Session 1: October 6, 1964

Leo Strauss: [In progress] The distinction is not clear, because it is not comprehensive. What people understand by[1] [theory] has to be described more precisely as hypothetical direction for the formation of hypotheses. The Marxist theory is not understood as a simply true theory, but as an hypothesis which has use up to a certain point. The same would be true of other theories of this kind. All non-hypothetical propositions are the result of empirical studies, not the result of theory. This is one view. The other view asserts that there is an[2] [absolute] and substantive political theory, a theory which makes non-hypothetical assertions. It is not necessary that they should be normative, but this, I think, is the more fundamental distinction. Indeed, it is hard to leave it at a non-normative political theory, as one can see by a variety of considerations, for instance, this one.

In any broader political analysis, we have to consider institutions as well as ideology. If one goes somewhat deeper into this distinction, one would recover an older formulation and find it very helpful, namely, we have to consider the regime—say, liberal democracy, communism, fascism, whatever it may be—and the regime depends ultimately on the end to which it is dedicated. The end is that which a society as a society looks up to and which gives the society its character. Now all these regimes lay claims. Liberal democracy says it is better than communism, and vice versa. This claim must be met, otherwise one will not do justice to this end, and meeting this way means considering the order of rank between the various regimes. Which is better?

Now I make a very big jump. In earlier human thought, the view prevailed that this order of rank cannot be determined if we do not know that which is by nature just. We can understand the more or less defective regimes as more or less great deviations from what is by nature just. This phrase "by nature just" is a literal translation of the Greek term in question. The same thought is better known by the traditional terms, natural right or natural law. I do not go here into the distinction between these two terms; I leave it deliberately at this. That this question is important can easily be seen because it is surely an important question to know whether there are any standards which are independent of the human will—this is meant by the term by nature; they are not set up by man.

Let us read a passage from Plato's *Laws*, in the First Book.

Reader:

> It is not for nothing that the laws of the Cretans are held in superlatively high repute among all the Hellenes, for they are true laws, inasmuch as they affect the well-being of those who use them by supplying all things that are good. Now goods are of two kinds—human and divine. The human goods are dependent on the divine, and he who receives the greater acquires also the less, or else he is bereft of both. The lesser goods are those of which health ranks first, beauty second, the third is strength in running and in all other bodily exercises, and the fourth is wealth, no blind

> god Plutus, but keen of sight, provided that he has wisdom for a companion, and wisdom in turn has first place among the goods that are divine, and rational temperance of soul comes second. From these two, when united with courage, there issues justice as the third, and the fourth is courage. Now all these are by nature ranked before the human goods, and verily the lawgiver also must so rank them.[i]

LS: That is perhaps the clearest and oldest statement that all legislation, if it is not to be blind and arbitrary, must be[3] [grounded in] some intrinsic order of things. This intrinsic order—these are the true principles of legislation.

Now today this view is generally rejected but, regardless of whether the assertion is sound, it is obvious that this is a question of the greatest importance for political science or law—whether there is such an order of the goods by nature, i.e., independent of human arbitration. In order to be able to discuss this question usefully and not merely to repeat the slogans from both sides, one must have some deeper knowledge. I mean to take cognizance of this passage and other passages will not do, and that means also in practical terms that one must consider historical knowledge.

I remind you of some parts of historical knowledge which are not far-fetched: the Declaration of Independence, where natural right is appealed to at the highest level of legislation; there are similar documents from the French Revolution, for example, the Declaration of the Rights of Man, which has this same sweeping character. Now if we compare these two famous papers with the Declaration of Right in 1689 or the Petition of Right in 1629 or, for that matter, the Dutch Declaration justifying the rebellion against the crown of Spain,[ii] we make this observation. The appeal to natural right, which is so clear in the American and French Revolutions, was not used in these earlier revolutions. Natural right apparently took on much greater importance politically in the eighteenth century than it had before. This, I believe, is also one of the generally-known facts. Many historians do not go on to the further question: Is that natural right which became so powerful in the eighteenth century the same natural right as that of the earlier century? Or is it not a new kind of natural right which gave natural law that political effectiveness it had in the eighteenth century and in a more or less disguised form up to the present day?

Now one can show that a fundamental change within natural right did occur, and the clearest passage regarding this fundamental change occurs in an entirely unexpected place, namely in Hobbes, in his *Elements of Law Natural and Politic*, where Hobbes says:

Reader:

> From the two principal parts of our nature, reason and passion, have proceeded two kinds of learning, mathematical and dogmatical. The former is free from controversies and dispute, because it consists in comparing figures and motion only, in which things truth and the interest

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[i] *Laws* 631b-d.

[ii] This declaration was made in 1581.

> of men oppose not each other, but in the later, there is nothing not disputable, because it compareth men and meddleth with their right and profit, in which, as oft as reason is against a man, so oft will a man be against reason.[iii] From hence it cometh that they who have written of justice and polity in general do all invade each other and themselves with contradictions. To reduce this doctrine to the rules and infallibility of reason, there is no way, but first to put such principles down for a foundation as passion, not mistrusting, may not seek to display, and afterward to build thereon the truth of cases in the law of nature (which hitherto have been built in the air) by degrees till the whole be inexpugnable.[iv]

LS: So in other words, Hobbes says hitherto natural law is this only in name or in claim, or natural law hitherto is built in the air. He will lay the true foundation, and he will do that by laying down the principle which will not be mistrusted, as he puts it, by passion, meaning the older natural law laid down principles against which passion rebelled. So the most promising beginning of a deeper study of natural law is then truly with Hobbes because Hobbes manifestly makes the claim that he is the founder of the solid natural law, in opposition to the traditional unsolid natural law. Now in a certain kind of textbook, Hobbes is always mentioned together with the sophists. That simply does not make sense. The sophists were not natural law teachers. The sophists denied that there is any natural law. Now what is true of the sophists is also true of Machiavelli. Whatever the relation between Hobbes and Machiavelli may be, Machiavelli does not know natural right, and Hobbes is the natural right teacher.

When I was a student—that's a long time ago—I learned that some change had taken place in the seventeenth century or thereabouts, but that the change was due to Hugo Grotius. He was a man, it was said, who liberated natural law from the theological tutelage. They quote a paragraph, which we will read shortly later, where Grotius says there would be natural law even if there were no god. So it is not based on theology, either on[4] [revealed] theology, Christian theology, or natural theology, theology based on human reason alone. But even at that time, when I was very young, if one had done a little bit more reading—for example, if one had read Gierke's book on Althusius, which is translated into English under the title *Political Theory*,[v] where he gives a survey, Gierke quotes there some scholastics like[5] Suarez, who accept the same thing.[vi] So if this is an important change—a non-theological natural right teaching—then this antedates

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[iii] "meddleth" is marked "inaudible" in the original transcript.

[iv] Epistle Dedicatory, found at http://etext.lib.virginia.edu/toc/modeng/public/Hob2Ele.html

[v] Otto von Gierke, *The Development of Political Theory*, trans. Bernard Freyd (New York: W. W. Norton, 1939).

[vi] Gierke refers to Francisco Suárez, a late Scholastic of the generation before Grotius (pp. 73-74). The same might be said of any Christian thinker who adhered to the rationalist rather than the voluntarist school of thought, holding that natural law was essentially rational rather than a product of arbitrary divine will. Suárez himself (cited later by Strauss for this reason: see footnote xv) names theologians belonging to the two schools of thought. See his *Treatise On Laws and God the Lawgiver* in *Selections from Three Works*, vol. 2, trans. Gwladys L. Williams, Ammi Brown, John Waldron, and Henry Davis, S.J. (Oxford: Oxford University Press, 1944), 189-91.

Grotius by a century, to say nothing of the fact that, at the face of it at least, the natural right teaching presented to us by Aristotle in the Fifth Book of his *Ethics* is not obviously a theological teaching. So this is surely based on insufficient analysis. So the claim on behalf of Grotius, in the way in which it is most customarily stated and possibly still stated in some underdeveloped countries [is not clearly borne out]. Yet Grotius may have nevertheless prepared this enormous change effected by Hobbes in a different way. This is exactly the point which we will examine: whether Grotius' natural law teaching is not already on the way, say, from Thomas Aquinas or from Aristotle to Hobbes. Grotius' work had a tremendous success, and this induces one to be open to the possibility that he did something which no one else had done, that he had said something new.

By the way, his life is one great adventure story, and if you have the occasion to read a biography, you should read it just for the fun of it. He was about to be condemned for high treason, was commuted to life imprisonment, and then he was saved by a ruse of his wife, who put him together with his dirty linen and got him out of that fortress, and then his end is equally traumatic. The life dates, just to keep them in mind: 1583 to 1645. He died three years after Hobbes's Latin version of the citizen, *De cive*, had appeared. Descartes had written a popular book, his first, in 1637, and Grotius lived at that time in France.[vii] He lived in this atmosphere of something new brewing, and which finally crystallized in the form of Descartes' and especially Newton's physics, but this was already somehow comical.

Now as for his stupendous fame, the prevalent answer today is [that] Grotius deserves to be celebrated not on account of his natural law teaching but because he is the founder of international law. Now this again is subject to all kinds of complications. There is a concise history of the law of nations by Nussbaum (Macmillan, 1947 or thereabouts), which gives you what a specialist in international law is likely to say today.[viii] Specialists have their great virtues, as we all know, but they have also their narrowness and therefore one must read this book with a certain reasonable caution. This is exactly the question: Is this a book on international law, and to what extent?

This question cannot be answered except by turning to Grotius' work itself. He has supplied it with a very long preface, which he called "Prolegomena," which is just the Greek for preface. It abounds with learning, simply overbearing, and not always solid. As the older commentators point out, he has mistaken all kinds of things. The book was written in two years, but of course when he was already a very mature man. But still, even a very mature and learned man can't write such a book in two years. There is also a certain ostentation of scholarship. On one occasion, wholly unnecessarily, he quotes, when speaking of the formula by which you formalize a contract, not only the Latin and Greek and Hebrew, but also the Arabic. I believe it is the only Arabic which occurs, and I think there is some ostentation in that, surely in a harmless way.

Grotius begins his observations with the assertion that no one has yet given a comprehensive and methodical treatment of international law, and to that extent it is

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[vii] Descartes' *Discourse on the Method* was published in 1637.
[viii] Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947).

justified to say that this claims to be the first comprehensive and methodical treatment of international law. Such a treatment is necessary since some deny that there is international law at all. These are the same people, of course, who say that there is no right at all, no right strictly speaking. Of course they know that there are laws, there are legal bodies of law, but they have nothing to do with right, with intrinsic justice. Grotius refers here to the advocate par excellence of this view, the Greek philosopher Carneades, a skeptic discussed at great length by Cicero in his *Republic*.[ix] The argument: the variety of legal orders [are] according to the variety of mores and utilities of the various societies. There is no natural right.[x]

Grotius argues against this as follows: there is a radical difference between men and the other animals. Proper to man is the appetite for a tranquil and well-ordered society with his fellows. Man is not merely concerned with his own utility and his calculations based on that; man is by nature a social being. In this respect, Grotius simply follows of course the tradition, of Aristotle especially. I have read somewhere that Grotius denies man's natural sociality, but I see no basis for this judgment. He goes on as follows: from this natural sociality of man there follows right in the proper meaning of the term, i.e., abstention from what belongs to others. There follows furthermore right in the wider sense of the term, i.e., abstention from everything which does not fit man's nature as the nature of the rational and social animal or, in other words, right in the wider sense means what agrees with any dictate of right reason. If right reason, for example, speaks in favor of thrift and liberality combined versus greed, avarice, stinginess, then it is right to combine in the proper manner thrift with liberality.

Grotius makes it clear from the very beginning that he is not concerned with right in the wider sense but only with right in the narrower sense, which he calls right properly understood. Right properly understood is limited to what belongs to others, i.e., what must be left to the others or be given to them. Now this distinction is absolutely crucial for Grotius and does prepare the later development. It is, in later language, the distinction between law and morality. In the older view, there was no clear-cut distinction between law and morality. That was worked out in modern times in a long process which was completed perhaps only at the end of the eighteenth century, but which was on the way throughout the seventeenth and eighteenth centuries. Here in Grotius we have a clear statement of the problem. There is a right narrowly understood; that is what falls under law in any sense of the term, natural or positive. Right broadly understood is identical with man's own duty.

[ix] Cicero, *Republic* III.5-21. Grotius discusses Carneades in Prolegomena, 5, 16-18. The edition used in the course was Hugo Grotius, *The Law of War and Peace*, trans. Francis W. Kelsey (New York: Carnegie Foundation for International Peace, 1925). This translation has been reprinted over the years by a number of other publishers. It is also made available online by the Lonang Institute (though without its notes and annotations) at http://www.lonang.com/exlibris/grotius/. References made here contain abbreviations of the original Latin title: *De Jure Belli ac Pacis*.

[x] Carneades was the head of the Academy founded by Plato, some two centuries after Plato. He is generally considered the founder of the "New Academy," which taught that certainty is not possible. He notoriously argued for and against justice on successive days, though the point seems to have been to facilitate discovery of which argument had the greater *probability* of truth.

Now when we come to paragraph 11—this is a famous or notorious passage which we should read.

Reader:[6]

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him. The very opposite of this view has been implanted in us partly by reason, partly by unbroken tradition, and confirmed by many proofs, as well as by miracles of heaven by all ages.[xi] Hence it follows that we must without exception render obedience to God as our Creator, to Whom we all owe that we are and have; especially since, in manifold ways, He has shown Himself to be supremely good and supremely powerful, so that to those who obey Him He is able to give supremely great rewards, even rewards that are eternal, since He Himself is eternal. We ought, moreover, to believe that he has willed to give rewards; that all the more should we cherish such a belief if He has so promised in plain words.[xii] That he has done this, we Christians believe, convinced by the indubitable assurance of testimonies.[xiii]

LS: Grotius rejects this view, obviously, but still he does not retract what he said at the beginning. This natural right would be right even if there were no God or divine providence. To that extent, natural right is completely independent of theology, natural or[7] [revealed]. But he goes on: God's existence is known by reason, and providence is known by perpetual tradition. That is the way in which I understand the passage. God's existence is confirmed by many arguments, his miracles admitted by all ages [and] confirmed [by] providence. Right[8] [remains]—but which right? Natural right, of course, but in the literal sense or in the strict sense? Right contains obedience to God, and this obedience is compensated with eternal rewards. He does not speak here of punishment and especially of eternal punishment, which will come up later in the long chapter dealing with punishment.

Those of you who can read Latin, a tiny minority, could see in looking at Suarez's *Treatise on Laws and God*[9] *the*[10] [*Legislator*], Book 2, chapter 6, section 3, that this is an old story in scholastic discussion.[xiv] There were some scholastics who said natural right is independent of any divine sanction.

I read a passage in a somewhat out-of-the-way writer, Feuerbach, the teacher of Marx in a way, in his book on Pierre Bayle, late seventeenth century, an acquaintance of Locke,

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[xi] In original: not "miracles of heaven by all ages"; "miracles attested by all ages."
[xii] In original: not "that all the more"; "and all the more."
[xiii] Prolegomena, 11.
[xiv] Suárez, *On Laws and God the Lawgiver*.

the first man of the[11] [Enlightenment] who taught that a society of atheists is possible.[xv] He quotes a passage from Bayle where he says there is an inner duty of virtue because the moral virtues impose certain duties on man prior to any commands which God has given. Therefore, Thomas Aquinas and Hugo Grotius could assert that we are obliged to obey the laws of natural right even if there were no God. I first tried vainly to find the passage in Thomas Aquinas where he could have said that, but I found that what he has in mind is the passage in the *Summa, Prima Secundae*, question 71, article 6, *ad quintum*, the answer to the fifth objection, in which Thomas makes the distinction that the philosophers do not speak of God in the moral discussions whereas the theologians do. This is a very tiny insufficient [place],[12] but I mention this for those of you who are curious.

Grotius admits of course a kind of right which does not stem from nature but from God's free will. Furthermore, it is of course possible to ascribe natural right to God, but the question is, is it necessary? It is also clear that natural right may have been[13] [revealed] in the Bible in addition to being[14] [revealed] in man's reasoning.[15]

[Natural law is distinguished from positive law of all kinds. There is voluntary law—as Grotius says, voluntary means dependent on will—and voluntary law is either divine or human.] Human voluntary law is, of course, the positive law of the various states, but this according to Grotius must have a natural right basis, because why are we obliged to obey the laws which some legislators, perhaps not the wisest of men, have laid down? So there must be a natural right basis for obedience to the laws of the country, and that is the natural right principle that must inform our covenants. There is a contractual basis in civil society which we transgress if we disobey the law.

Carneades is simply the symbol, the emblem as it were, of those people who deny natural rights. Against Carneades, he asserts not utility as a model of right as [do] the utilitarians whose name comes from that assertion, but the nature of man. Nor is utility the mother of civil right, of human right, because civil right owes its obligatory character to consent and not to utility. Surely considerations of utility enter legislation, but once you are confronted with the product of legislation, it is not the utility which imposes the duty to obey.

Grotius comes then to speak of a third kind of law, the *ius gentium*. Now this term begins to mean in Grotius and also in Suarez, international law, the law between the nations. Traditionally it did not have this meaning. Traditionally it was either something natural in itself or a certain part natural, or it was as it also is in Grotius, a universal law—a law obeyed everywhere, not because it is natural but because there is a consensus of all or most nations in its favor. This we must keep in mind because this will come up time and again in the course of the book. *Ius gentium* came to mean nothing but international law. That is a post-Grotius development and obviously of very great importance for the

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[xv] Ludwig Feuerbach's *Pierre Bayle: Ein Beitrag zur Geschichte der Philosophie und Menschheit* (Berlin: Akademie Verlag, 1967) was first published in 1838. Feuerbach quotes a number of passages from Bayle to the indicated effect in the section "*Die Selbständigkeit der ethischen Vernunft*" (86-108).

history of international law. Of the law of the nations, *ius gentium*, Grotius says that it is both convenient to human nature and useful. The usefulness is here more necessary for making it obligatory than in the case of the other laws.

Now he gives here some reasons in favor of international law, very manifest reasons which I suppose are still repeated today. Every state, however strong, needs outside help from time to time: hence alliances. These alliances are absolutely worthless if there is no presumption that the promises will be kept. This is an act of justice, of right, hence a need for right among nations, or for the human race as a whole. An indication, and a most important indication, of the fact that there is a right of nations is that there is a right of war, and war is not a wholly lawless thing. This right of war applies both during war, what you may or may not do to the enemy, and also at its outbreak. A war must be just. This old scholastic teaching is in principle absolutely accepted by Grotius, and the later development in international law, as I learned from Nussbaum, was to get rid of the conception of the just war. This seemed to work very well until the world wars in our age, where the question of war guilt was raised at the end of the First World War, and of course much more emphatically in the Second World War.

Grotius' intention, as he says, proceeds from the fact that all right of war is disregarded throughout the Christian world. This was written during the Thirty Years War.[xvi] This state of things led many Christians to deny that war can ever be just, especially since Christianity demands above all charity toward all, and how can war be a charitable act? He mentions here only one Christian author, and that is Erasmus, also a Dutchman—I forgot to say that Grotius is a Dutchman. Now Grotius opposes both errors, namely, the error, a) that war is simply not subject to law in any sense, completely lawless; and the other error, that war is as such improper. He will discuss this in the body of the book. Hitherto we can very well have the impression that Grotius' work is concerned with what is now called law of nations or international law and nothing else. If one looks at the book from this point of view, one will find very much irrelevant material. There is a lot of private law, not even international private law, but municipal private law in it.

Let us therefore now consider the full title of the book, *On the Right of War and Peace, Three Books*,[xvii] in which the law of nature and of the nations are explained, and also the most important things of public law. So clearly the book is not limited to international law. It is also[16] public law, what we now call constitutional, as well as this natural law, which is not limited to international law of course, and the *ius gentium*, which has this ambiguity, according to which it does not mean merely the law obtaining among nations, but all law accepted by the human race as a whole, or by the civilized nations, regardless of whether it pertains to relations among them or within them. To mention only one

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[xvi] The Thirty Years' War (1618-1648), a conflict between Protestant and Catholic, was one of the bloodiest wars of European history.

[xvii] The Latin title is *De Jure Belli ac Pacis*, which is often translated as *The Law of War and Peace* (this is the title of the translation Strauss uses in this course). "Right" seems a more likely translation of *ius* (*jure*) than "law," but Grotius uses the word in the sense of "law" as well as "right" (and Strauss translates both ways in this transcript). Readers should bear in mind that the Latin is ambiguous.

example, the laws regarding incest, the prohibitions against incest, are according to Grotius not natural prohibitions, but prohibitions of the *ius gentium* in the old sense of the word. The proof that they belong to the *ius gentium* and not merely to the municipal laws, is that they are forbidden in all civilized nations, incest surely between parents and children.

Now in the thirtieth paragraph, which is a restatement of his intentions, [is something] which I think we should also read.[17]

Reader:

> At the same time through devotion to study in private life I have wished—as the only course now open to me, undeservedly forced out by my native land, which had been graced by so many of my labors—to contribute somewhat to the philosophy of the law—

LS: Jurisprudence. Jurisprudence has of course in Latin a broader meaning than it has now in American or British usage. It means all study of the law, all intelligent study of the law, whereas jurisprudence is now more or less philosophy of the law, if I understand the present American usage correctly, or am I mistaken? But let us not say philosophy; let us say jurisprudence.

Reader:

> which previously, in public service I practiced with the utmost degree of probity of which I was capable. Many here before have purposed to give try this subject a well-ordered presentation;[xviii] no one has succeeded. And in fact such a result cannot be accomplished unless—a point which until now has not been kept sufficiently in view—those elements which come from positive law are properly separated from those which arise from nature. For the principles of the law of nature, since they are always the same, can be easily brought into a systematic form—

LS: Into the form of art[xix]—

Reader: "but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment—"

LS: Outside of art[xx]—

Reader: "just as other notions of particular things are."[xxi]

[xviii] In original: "Many heretofore have purposed to give to this subject a well-ordered presentation."
[xix] The Latin is *in artem.*
[xx] The Latin is *extra artem.*
[xxi] Prolegomena, 30.

LS: So as we see here, a very old fashioned notion of what belongs to an art or to a science, but this is the Aristotelian view. He wishes to reduce *jurisprudentia* to an art, which many have tried to do, but no one has succeeded. Why did they fail? That is important. They did not distinguish sufficiently between the natural and the positive. They qualified the law, making clear perhaps here and there that this is natural law and this is positive law, but they did not separate them throughout. Only the natural part of law can be reduced to the form of an art because of its unchangeable character. The positive laws are, like other individuals, outside of art. This is perfectly intelligible to those who know somewhat of the older way of thinking; today it is very strange. Let us reflect on it for a moment.

Take a goat or a rabbit or a dog. A zoologist is not interested in this dog here as such. It is for him only one specimen which could be easily replaced by any other, unless the dog has one peculiar character, say, two heads, but then he would not be interested in this dog but as the only specimen of two-headed dogs. The individual as individual is not interesting to science. It is of course of the utmost interest to the dog owner. Dog is a better example, as I see now, than the[18] [goat] or the rabbit, because people get more attached to dogs than to other animals. But the individuals are not of any concern to any science or art, only the universal science. The universals as universals are unchangeable. These laws, the innumerable laws produced and changed any day all over the world, what can be interesting in them—except of course for the citizens of that particular community or family, because they have to obey[19] [them]—but there can be nothing of theoretical interest. There can be nothing of practical interest even in the broader sense of practical. Of what interest can it be to us, to be quite neutral,[20] [what] the Greeks and the Yugoslavs may stipulate regarding property intestate, unless we have an uncle there from whom we hope to inherit? Then it is of utmost interest to us as individuals, but otherwise not. You see here the very great change that has taken place since the time of Grotius because today all these legal or moral systems are studied by scientists, scholars, with utmost interest, and are not dismissed as theoretically uninteresting.

Now one great step which was taken between us and Grotius was the one taken by Montesquieu on the *Spirit of the Laws*. By the spirit of the laws, he meant exactly the spirit of all these various [21] [codes], through study of which we hope to arrive at the true principle of legislation. One can say this passionate concern with the positive laws of the various societies emerged in proportion as the belief in natural laws receded. If the only laws are positive laws, we cannot understand man's legal mind—the way in which man goes about legislating and thinking about laws—unless we study this infinite variety of legal codes and reach then a more or less plausible inference.

But to come back to Grotius' work. The work surely combines in a strange way the law of war—war comes first, the right of war—and the whole sphere of law, or the sphere of right. Somehow he must have assumed, unless this is mere accident due to his pre-history, that a rational view of the law of war is inseparable from a rational view of right or law as a whole. From what he said in paragraph 30, it follows that Grotius also tacitly excludes[22] the divine positive laws from the art of jurisprudence as he understands

it. Yet he makes clear in the next paragraph, 32, which we can read because it is very short:

Reader: "What procedure we think should be followed we have shown by deeds rather than by words in this work, which treats by far the noblest part of jurisprudence."[xxii]

LS: We can say that Grotius' work deals with the most noble part of jurisprudence. As an older commentator[xxiii] said, this was not a[23] [matter] of public law. It is somehow more noble, concerning immediately kings and princes than the details of family law and so on. Still, primarily as it is made clear in the sequel, the theme is the right of war and peace. Here again he states in paragraph 37 that his predecessors had not distinguished in treating the right of war and peace what is natural law, what is divine law, what is *ius gentium—gentium* here [meaning] positive but universal law—and what is merely municipal law. Also, and this is addressed to the scholastics and lay scholastics; they lack the light of the histories. That was a common complaint of these young Turks of the sixteenth and seventeenth centuries, that the scholastics lacked the light of[24] history. They were concerned with the problems in very general terms, but not having read Thucydides and so on, they lacked something important.

Now Grotius will prove the propositions of natural right, which are after all the core of the whole thing, by their own evidence. Say, if there is a right of the freedom of the ocean, to which Grotius devoted an earlier work,[25] he will show it by reason.[xxiv] The ocean is of such a nature that the freedom of the seas rather than the dominion of the seas is reason. But he will also show it by the testimonies of authors, historians, poets, although he admits that this testimony of the philosophers and so on,[26] the mere testimonies, go indiscriminately to natural right and to the *ius gentium*.

I should use now a convenient translation to make clear in which sense *ius gentium* is used in this case, say, "universal positive law." He repeats here the distinction. The law or right of nature consists of correct inferences from the principles of nature, say, man is a rational social animal, the highest principle. *Ius gentium* is based on some common consent of the human race or the[27] [better] part of it.

He has to say then something about the authorities, because he will use authorities in order to buttress his argument. When you turn to the founder of natural law, Hobbes (and the same is also true of Locke) this has completely disappeared: no longer authority [but] reason alone. I think if one would make a close study of the fundamental argument of Hobbes, one would find very few proper names except polemically—against Aristotle especially, but very few. And the same is true of Locke.

Grotius belongs to the older world where authority was still respected. The phrase used is that Grotius is still a humanist. This word[28] has so many meanings, but it means in this

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[xxii] Prolegomena, 32.
[xxiii] Strauss may mean J. F. Gronovius, to whom he refers throughout the course.
[xxiv] *On the Law of Prize* (*De Jure Praedae*), of which a single chapter, "Freedom of the Seas" (*Mare Liberum*) was published separately in 1609.

case[29] [not being limited] to strict and severe demonstrations, but [using] these kinds of voices,[30] displaying[31] men's learning, [and producing] beautiful sentences.[32] Grotius is so good as to translate the Greek sentences into Latin, so that the more ignorant part of the reading public could read it.

The authority whom he respects is, of course, still Aristotle, the Philosopher. Here you see the change. After having made this bow to him, he points out his grave error. This is in paragraph 43. They all turn around the principle of Aristotle's morality, that virtue consists in a mean between two[33] [extremes], or faulty extremes. This criticism is not very original; it goes back some way. We do not have to go into Plato but we only know that this symptom of the great rebellion—how he speaks about Aristotle—is present here.

The commentator whom I use because he happens to be bound to that edition of Grotius which I have,[34] [Gronovius],[xxv] points out very solidly that Grotius simply didn't understand Aristotle, which is true, but this is also part of this new world. It is no longer so important to take this very seriously. Good riddance.

Now the main point of Grotius' critique of Aristotle is this: Aristotle, by asserting that virtue is a mean between faulty extremes, says in effect that moderation of the passions is the essence of virtue—not extirpation, but moderation.[35] [Giving in] to anger isn't wise. To be unable to be angry is also a defect, but to be angry at the proper occasions—that's right, and the same applies to the other passions too. Grotius says moderation of the passions is not of the essence of virtue, and the proof is that there cannot be an excess in the worship of God, for example: thou shalt love God with all thy heart. The issue has been taken up in the present campaign, as some of you will remember.[xxvi] Now what would Aristotle say as to Grotius' argument, to make this quite clear whether we can trust Grotius implicitly or we have to be a bit cautious. What would he say? He thinks especially of the Bible. The commandment of God absolutely, explicitly, is a refutation of Aristotle's *Ethics*.

Student: Loving god for Aristotle would require some intellectual understanding of it, of what god was,[36] [which] would be an intellectual approach to it—

LS: There is something to that, but one could discuss it more simply.

Student: Aristotle would say that there is something[37] [to which moderation doesn't apply]. He speaks of murder, for example—

[xxv] Johann Friedrich Gronovius (1611-1671) produced an extensive commentary in the form of footnotes to Grotius' text. Strauss refers to him periodically throughout the course.

[xxvi] An apparent reference to the statement of Barry Goldwater, Republican candidate for President in 1964: "I would remind you that extremism in the defense of liberty is no vice! And let me remind you also that moderation in the pursuit of justice is no virtue!" Goldwater made this statement in his acceptance speech at the 28th Republication National Convention, July 16, 1964.

LS: That is a passage which he quotes . . . but could one not say—does it not make sense to say that, as it has often been said, I don't say by the profoundest thinkers but there is a certain reasonableness to say that there is an extreme called superstition on the one side, and another extreme called[38] [atheism], and religion is in between. Hobbes himself used this example very early, when he had not yet broken with Aristotle. He says he was neither superstitious nor an unbeliever. Aristotle did not claim that the analysis of virtue according to this simple schema exhausts the issue, of course, but it is an important point.

We have to consider two more passages; the one is paragraph 57.

Reader: "I have refrained from discussing topics which belong to another subject, such as those that teach what may be advantageous in practice."

LS: What may be useful to do. What is his question? What is right, what a man may do, but not what is useful.

Reader: "For such topics have their own special field, that of politics—"

LS: Their special art.[xxvii]

Reader: "that of politics, which Aristotle rightly introduces by itself, without introducing extraneous matter into it. Bodin, on the contrary, mixed up politics with the body of law with which we are concerned. In some places[xxviii]—"

LS: It is difficult to discern his answer, but Aristotle wants to keep the political art strictly separate from the legal art, and Grotius in this respect agrees with Aristotle against Bodin, the famous French writer—1576 if I remember the date at which Bodin's book appeared, a half century prior to this.[xxix] Let us read the next paragraph [58].

Reader:

> If anyone thinks that I have had in view any controversies of our own times, either those that have arisen or those that can be foreseen as likely to arise, he will do me any justice.[xxx] With all truthfulness, I aver that, just as mathematicians treat their figures as abstracted from bodies, so in treating law, I have withdrawn my mind from every particular fact.[xxxi]

LS: Here mathematical does not mean as much as it means in Hobbes, but still the reference to mathematics is quite interesting. Grotius was an acquaintance, perhaps even a friend, of Stevin, a master of the art of fortification and, even more important, one of

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[xxvii] The Latin is *artem specialem.*
[xxviii] "Bodin" is marked inaudible in the original transcript.
[xxix] Jean Bodin's *Six Books of the Republic* appeared in 1576.
[xxx] In original, not "those that can be foreseen"; "those which can be foreseen." Not "any justice"; "an injustice."
[xxxi] Prolegomena, 57-58.

the founders of modern[39] [engineering].[xxxii] This was in his immediate neighborhood. I mean, this new world which was then completed as it were at the end of the seventeenth century was already[40] [developing], and Grotius had his share in it. What this means in precise terms and not merely in [an] impressionistic manner is our task to find out. I believe we can say that the key point by which Grotius prepares for later development is the strict distinction between law properly understood, or right properly understood, and right in the wider sense, which prepares the later distinction between law and morality. But that is not the immediate consequence. The immediate consequence is this, [the distinction between strict right and broad right], and that will come out also when we read for next time.

Grotius tries to lay a solid and clear foundation for this distinction. I mean, it is plausible enough that not everything can be legislated, that everything which is morally good can[not] be legislated. Everyone admits this in a general way. But is there a principle there? A later formulation was that only those moral demands can be legislated which are by their nature enforceable, [not], for example, everything relating to our thoughts. It is obviously better to have pure thoughts than impure thoughts, but this cannot be legislated because human[41] [legislation] is wholly unable to bring it home. It goes also to other things.

That is not the line as Grotius draws it. Very simply stated, based on a passage in Cicero (and we will see that next time), there are things that are primary in manner and they can be reduced, for convenience's sake, to [such] simple things as the desire for self-preservation, something which in itself is not peculiarly human but comes to man and the other animals. But human development towards maturity, towards perfection, consists precisely [in the fact] that man becomes aware of another end, a higher end or ends than mere self-preservation, so much so that self-preservation may have to be sacrificed for these higher ends.[xxxiii]

Let us distinguish these two considerations simply by speaking of the beginning and the end, but [the] end now understood in the Aristotelian sense: perfection. What Grotius is trying to do is base a right strictly understood on only self-preservation and the like, and to leave the end and everything connected with the end to another art. Now those of you who know Hobbes or Locke see immediately how important[ly] Grotius prepares Hobbes and Locke. [LS writes on the blackboard.] This is the end, and this is the beginning, and, for simplicity's sake, I call this self-preservation, and this is virtue. This is the content of right strictly understood, and this is the content of right loosely understood, and only the strictly understood is of real importance to Grotius' work. The higher dignity of this is to [be] recognize[d]. Now we see what Hobbes does. It is a very simple operation, which I can demonstrate. What Hobbes, Locke, and other people of this school are trying to do is to show that what we mean by virtue can be fully understood as a means for the beginning. If you want to preserve yourself—for example, if you overeat or smoke or

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[xxxii] Simon Stevin, Flemish mathematician and military engineer. Stevin wrote three treatises on military science. See *The Art of War*, vol. 4, *The Principal Works of Simon Stevin,* ed. W. H. Schukking (Amsterdam: C. V. Swets & Zeitlinger, 1964).

[xxxiii] Cicero makes this argument in *De Officiis* I.4.

whatever it may be, then you endanger yourself. You don't have to have another consideration. The same applies also to other things [such as] justice, otherwise you would destroy society if you act unjustly. If there are no cops, imagine what would happen to you. But this we will discuss at greater length on more solid ground next time.

Student: You say he leaves it all to art. What is this other art [dealing with the perfection of man]?

LS: Moral philosophy, moral science, to some extent theology, moral theology. In principle it is clear: either moral philosophy or moral theology. How they are related to each other in his view we must wait and see.

If this distinction between law and morality is of a fundamental importance, and I believe almost every civil liberties discussion implies that it is of fundamental importance, then Grotius is surely a man whose contribution has to be considered. On the one hand, one could say that his solution seems to be wiser than the Hobbean solution. It is really impossible to understand morality proper in terms of that [lower] consideration, but within a certain context we limit ourselves to this lower part. But the principal question is not decided by that. Why does it make sense to say that within limits a distinction between law and morality is possible? Is there necessarily one and only one clear-cut principle for making that distinction? That would be a question. That it is an obvious convenience is valid but, as I say, whether there is a single clear principle—"and up to this point you may legislate, and beyond this point it is impossible to legislate"—that is still a question. In a very general way, it is of course true that to the extent to which you want to have a larger degree of freedom for the individuals you are interested in such a distinction. In the extreme case, if all moral commands can be legislated, there is very little freedom left for the individual. Well, one could say the freedom to act virtuously is left, but in the ordinary and practical sense of freedom, there is very little. In this sense, Grotius is of course one of the men who prepare the greater liberty we have in modern times.

I would like to bring up a question which was implied in something that I said before, the question of the idea underlying the whole work. How come his work is devoted to the right of war and peace and yet to natural right in general? Of course, these are the two broadest formulations. I think one could understand that. The greatest obstacle to natural law is war. If right is possible only in peace, peace cannot be established by law, by lawful means in contradistinction to unlawful means—Machiavelli's argument—then one must say that Romulus, the killer of his brother, is the prototype or symbol of the foundation of civil society. The killing of the brother is the basis of right, because only once you have peace can there be right. Needless to say, this view has infinite consequences in all interesting situations. If the commands of right are valid only under these conditions, then the securing of these conditions cannot be subject of right. That is Machiavelli's simple point. By the way, Machiavelli's symbol of Romulus is also biblical, even though Machiavelli does not point it out: Cain and Abel, Cain the first founder of the city. From this point of view, one could say Grotius' work in fact is a reply to Machiavelli, but I have not seen any reference to Machiavelli hitherto.

One can say the problem[42] more specifically as follows. The first step of the argument is [that] there exists a jungle not subject to any form of law, namely, war. If this is so, two consequences are possible: a), stay out of the jungle, i.e., one must not wage war under any circumstances, war is essentially unjust. Grotius will discuss this in the second chapter. The second possibility is that, no, you can't stay out of the jungle; it is impossible, the jungle comes to you. The jungle threatens peace, and if this is not to destroy the idea of right, war must be fought justly. There must be a right of war. That is of course the line which Grotius takes.

Student: You referred earlier to a quotation from Hobbes. What did you mean, if anything, to say about the relationship of reason and passion[43] [in] Grotius?

LS: Nothing. I did not have this in mind; I only said here we have a clear claim by a man who is respectable to[44] [the] extent that he was not a fool, that he said I am going to revolutionize natural law from top to bottom. No such claim in Grotius. Grotius' claim is much more limited, namely, that he made one special legal discipline, what we now call international law, an orderly discipline. Hobbes is much broader. Therefore, I say that if one wants to see the issue, one must begin with Hobbes and not with Grotius; and once one has seen that the big watershed is Hobbes, [45]from this point of view Grotius surely belongs to the old world. But then there arises a more subtle question: Does he not modify these older teachings so as to prepare in his way the revolutionary change made by Hobbes?

You know there is this Hegelian phrase popularized especially by Marx, that a quantitative change turns from a certain moment into a qualitative change. Say someone's lungs are not so good as they were five years ago: quantitative change. But then the point can be reached where they do not work at all, and then there is a qualitative change indicated by the word "dead." There are other changes apart from that. There is also the change from one being to another. One can say that the change effected by Grotius can still be understood as a quantitative change, a shift of emphasis, but the whole edifice remains. If you go a few steps further, then the edifice crumbles, and then you need a new one, and that is what Hobbes says.

Student: How would you, in the case of Pufendorf, who claims that in the opening to one of his books, the authorities are equally Hobbes and Grotius, and who I think Gierke said[46] [made use of] of sociality—

LS: I do not know Pufendorf very well. I mean, I looked at him in the introductory section, but Gierke was of course a first rate historian of law but completely deprived, if I may say so, of any understanding of the philosophic issues. Therefore, that is always the danger when one uses Gierke. I say this with all respect, but as a warning nevertheless.

Here I must state another rule. The big change is the one made by Hobbes. This was really a revolution. As happens also in political revolutions, afterward there comes in a reconciliation. Some people say he's got a point, but did he throw the baby out with the

bath? That can be done on high levels, as it was done by [inaudible] especially; it can also be done on somewhat lower levels and that is, as far as I can judge, the case of Pufendorf. Pufendorf tries to recover some of the traditional things which Hobbes simply dismissed, but the whole edifice is nevertheless[47] Hobbean and no longer traditional. No longer authorities, but demonstrations.

Student: Would you say that the example of Pufendorf [shows that any man] has the right to reject what someone else would say[48] [regarding his own preservation]? Self-preservation[49] [is inalienable].

LS: Yes, this example was used by Carneades in order to show that there are cases where it is impossible to impose any duty, positive or natural, on men.

The difference between Hobbes and Carneades is this: Carneades says that this proves that there is no natural right.[50] [Right cannot exist], because there are cases where it is impossible to say which is right and wrong, and Hobbes says: What you regard as a refutation of right is the very basis of right. In other words, he turns the skepticism of Carneades against Carneades, just as in a much more general way Descartes turned the skeptical arguments against skepticism by saying: If you think through your skepticism, you will have discovered an absolute certainty to your skepticism. And so Hobbes says (although he doesn't say so, but one can interpret it) [that] what you regard as a hopeless objection is the proof of natural right. This right of self-preservation leading to this insoluble conflict is the fundamental right. The natural right teaching cannot mean more than to abolish the conflict between the self-preservation of the many within the limits of the possible, and that means of course civil society. It cannot be completely abolished as we know since there are still people who in civil society commit murder, although it is punishable with death. They are great fools from Hobbes's point of view, but unfortunately quite a few of them get away with it, which makes the low calculation not as foolish as it should be. As I say, Hobbes turns Carneades against him, and what is Pufendorf's point?

Student: I thought this might be a[51] [leading] example of Pufendorf being closer to Hobbes than to Grotius.

LS: I believe that Grotius would also say, at least to my recollection, that in this case you cannot make any prescription, or did I misunderstand what you said about Pufendorf?

Student: I thought that this might indicate that Pufendorf's use of this example would indicate closeness to Hobbes, rather than to Grotius.

LS: Not necessarily. When you look at Pufendorf's work, how it is built up—the chapter headings and so on—and compare it with Hobbes on the one hand, and Grotius and the others on the other hand, and you will see immediately. If I remember, Pufendorf begins with a chapter on the state of nature, or the second chapter. You would look for a chapter on the state of nature in Grotius in vain. In Hobbes, you have it. These are the specifics. But I had no occasion to bring up this subject of the state of nature, but this is one

[matter] of the greatest importance in this change, the concern with the state of nature. This is in Hobbes absolutely crucial, and in Locke too, as everyone knows, and also in Pufendorf. But in the earlier thinkers it is not so. Again, it is not something which greets you as the most fundamental consideration. They speak of the state of nature, but what they mean by it requires in each case careful consideration. It is not necessarily what Hobbes meant by it, or what Locke or Rousseau meant by it.

In other words, the question whether the state of nature is good or bad—an apparent issue between Hobbes on the one hand, and Locke and Rousseau on the other—that is not the fundamental issue. This is an issue which arises only when it is said everything depends on your understanding of the state of nature. Did the thinkers prior to Hobbes say that? From the external plans and composition of their works, it wouldn't seem so.[52] I do not have *De cive* here,[53] but I think in *De cive* it is the first or second chapter, and in Pufendorf if I remember well, the same: the state of nature is a primary thing. It is surely not a primary thing in Grotius. Look up the chapter headings, and even in the paragraphs, the sections of the chapters, you will [not] find the words state of nature. This is admittedly quite external, but it is also symptomatic. What this means is that the state of nature became so important in the seventeenth century,[54] [in a sense that it was not before].

Student: There was an interesting question raised in your opening remarks about theory. The ancients presumably did not have a political theory, in the sense that they regarded political science as a practical science, and Grotius is said to be the father of international law—

LS: From this point of view, Grotius belongs absolutely to the old world, as even Hobbes does. Anyone who taught something like natural law, or even[55] [moral] law, if you can make a distinction between the two, belongs, [according] to the present point of view, to the old fogies, naturally.

Student: Couldn't you say that Hobbes has a political theory?

LS: Still, it is an absolutely normative theory. Starting from the fact that the fundamental phenomenon is self-preservation, or fear of[56] [war] and death, he deduces geometrically that you must have a sovereign who has these and these and these powers; and if you happen to live in an underdeveloped country where these powers are divided, and say one part is the Senate, and the other is to the people, and the other to the king, then of course it is the duty of any man who has the power to effect it, to declare the constitution unconstitutional.

Student: So you have the following situation where the ancients in a way do not have a political theory. Hobbes has a political theory, but it is not divided into normative and[57] [causal], and today we have a political theory which is divided.

LS: No. This is so subtle that it is misleading. This kind of political theory which I sketched and which is now called causal theory simply didn't exist, especially in the form

which it has now, that theory as theory is only a tool for the formation of hypotheses. This is a very novel thing, back fifteen years at the most, but[58] [at] present has a very great power and one is compelled to face it, to meet its claims. And so even if [a] theory should rule which is wholly unreasonable, it becomes respectable on account of its power, not because one is necessarily afraid of losing one's job, but on the influence which it exercises on the younger generation. We must take it seriously from this point of view. I did not mean more than that, and I led up only to this point: that if you take the thought of political theory seriously, you must face the question of norms and our knowledge of them, and the most powerful tradition asserting that there are such norms independent of human[59] [agreement] is a natural law tradition. Therefore I suggested that we should familiarize ourselves with that tradition a bit, and one way of doing that, and surely not the most elementary way,[60] would be to read a few classic texts, especially Thomas Aquinas and Hobbes. But we have a seminar with a number in the 400's and therefore we may presuppose, if not a great deal of fact or information,[61] [then] a certain theoretical sophistication which can easily be actualized in a few meetings, if it is not sufficiently actualized before. I express myself in this complicated way only for reason of politeness. The issue of this kind of political science or theory is very important, but we cannot handle it here.

Student: Doesn't Aristotle say, if he was confronted with the example of Carneades,[62] [man] does anything to preserve himself and knows no duties?

LS: We come to the question of self-preservation later on. You mean what Grotius says?

Student: No, in other words, in what you have said about Grotius' approach, is there anything that indicates a departure from Aristotle?

LS: This comes out much clearer in what we shall discuss next time, this clear-cut distinction between the beginnings and the end, and that right strictly understood has only to do with the beginnings. But it is not so difficult to figure out. I don't remember whether Aristotle speaks about this question, but it is not too difficult to figure out what Aristotle meant on this thing. I suppose Aristotle would say if someone in this situation throws the other men[63] [in to save] himself, it is generally speaking impossible to treat this as murder because of the extreme character of the situation, number one, and therefore one should not punish others for that.

But then if the question arises, there is a great difference between being not punishable and good, let us assume that the other man—let us assume what fortunately didn't happen when General MacArthur made his famous trip to Australia. They shipwreck, and he and a marine are on an island and they know they cannot last for very long, and so what shall be done? From the point of view of simple self-preservation, the marine has as much right to throw MacArthur into the sea as vice versa, but if he thinks further he will say that the self-preservation of MacArthur is much more important, and it is not beyond human possibility to act on that. People have sacrificed their lives, have gone knowingly to death under other conditions too. In such a case, the rational or moral consideration is the question: Whose life is more important, not for me selfishly, but for the community?

You can also take a simpler example: a father of a large family, and a bachelor. Here of course you have to assume—and this annoys people in these characteristic discussions because people in this situation are not likely to think very clearly. That is perhaps the reason why one should think about them before one comes into them. But these are not meaningless questions, and they are questions where you can distinguish between the wiser and the less wise, more virtuous and less virtuous decision. I do not know by the way what would have happened to that marine who would have thrown MacArthur into the Pacific.

Student:[64] [Raising] the question of eating, food, brings up the question of cannibalism.

LS: That is of course too shocking that the two men should decide who should eat whom. I think the example shows that the question of self-preservation, the decision merely on the ground of self-preservation, is narrow. It is useful perhaps for the litigation of penal law that people should not be punished for doing things which are very hard for ordinary human beings to do. That is a humane and sensible proposal.

Grotius emphasizes time and again what can be done with impunity is not necessarily a wise or virtuous thing. This is of course the great reason why[65] some distinction between law and morality is in order. The question is only the precise grounds of the distinction and the limits.

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[12] Deleted "waste."
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[14] Deleted "revered."
[15] Deleted "Natural law is distinguished from positive law, all kinds, whether it is a voluntary law, as Grotius says voluntary meaning dependent on will, and the voluntary law is either divine or human." Strauss may be thinking of Prolegomena, paragraph 12, following on his discussion of paragraph 11.
[16] Deleted "the."
[17] Deleted "Page 20, at the bottom."
[18] Deleted "dog."
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Session 2: October 8, 1964

Leo Strauss: I would like to say a few words about your paper.[i] When Grotius teaches about a certain interpretation of the Sermon on the Mount, that it is the right for men to kill men, either capital punishment or war, is this in itself an innovation, something peculiar to Grotius?

Student: I don't think so.

LS: It was a common view, therefore we must see whether it is necessary to dig any deeper. But I think you should take up this rather subtle point you made about the relation of the two testaments when we come to that.

I remind you first of the claim which Grotius raises in his Prolegomena. He claims to be the first to give a complete and orderly treatment of what we now call international law. But he also says he is the first to reduce jurisprudence to an art, i.e., not merely international law but all law. I did not make this observation last time, [that] this phrase, "to reduce jurisprudence to an art," contains a very great implication. After all, jurisprudence is a form of prudence, and prudence is according to Aristotle not art. Therefore there is here a very great problem which we just passed over. From Aristotle's point of view or from Thomas' point of view, which in this respect are identical, there is something intermediate between prudence and art, art in the wide sense where it may also include all theoretical science. What is that? This is not developed in Aristotle, at least I don't remember at the moment, but it is clearly developed by Thomas Aquinas[1] [and the Thomistic] tradition.

There are things called practical sciences. For example, the management of the household is an affair of a certain kind of prudence, but there are some broad canons or rules regarding the management of the household, including for example acquisition as well as distribution within the household, the treatment of children, wife, servants, and slaves.[2] These things can be treated, let us say, academically. The same is true, of course, and it makes a more interesting case: politics. The virtue required for acting wisely in political matters is political prudence, prudence of the statesman. But there is an important part of what the prudent statesman, as it were, tacitly acts upon which can be presented coherently, academically, and with greater clarity perhaps than the statesman himself sees it. This then would be political science as distinguished from political prudence.

There is then according to this fundamental Aristotelian view the possibility of practical sciences which are practical in their subject because they guide toward action, but it has a certain distance from practice. To mention only one point: prudence proper, whether it is private prudence or the prudence of the household or political prudence, is not possible without moral virtue, according to Aristotle. What you can have without moral virtue is cleverness, smartness, but this is precisely not moral virtue, but the opposite. Prudence proper is inseparable from moral virtue. The practical sciences do not require[3] moral

[i] The session began with the reading of a student's paper. The reading was not recorded.

virtue. A very simple and famous case: a professor of ethics who leads a very unethical life, and what he teaches may be perfectly correct. That is a great riddle and surely a very deplorable fact, but this is one of the facts of life. Now let us apply this to jurisprudence. Jurisprudence proper, the prudence of the judge on whatever level, is inseparable from the passionate concern with justice. But if jurisprudence is transformed into an art, then this is something which can be dealt with academically and presented with formal elegance, and without this inner appearance which I suggest. This is a subtle distinction, but a very important distinction which we must keep in mind.

But to come back now to Grotius' claim that apart from founding, as it were, international law as an independent discipline, he wishes to reduce jurisprudence to an art. And then he says this is possible only if one limits oneself to natural right, because all possible right, all right dependent on will, cannot be rationally surveyed, and he therefore implicitly claims that he is the first to present natural right coherently and comprehensively. The traditional way of doing[4] [this is seen in] the *Summa theologica*. There is a discussion of natural law in general terms, and then[5] [Thomas] goes into the particular question, say, usury or murder or whatever it may be, and he does not make in each case a clear distinction, explicit distinction: Is this particular prohibition or command of natural right or of divine right or of positive right? For Grotius, that is a constant concern throughout the book, whenever he discusses anything, say, ransoming of prisoners of war, or whatever it may be: Is this according to natural right or is this according to any other right? He does not have a code as it were of natural law. That is what came on the basis of Hobbes later. In the late seventeenth and eighteenth centuries people tried to build pure natural law works. This came later, but it is surely prepared by Grotius.

Grotius makes also clear (and here we come to a point which was touched upon before) that he is particularly concerned [with] or even limiting himself to right properly understood. This is in contradistinction to right in the wider sense of the term, which requires abstention from everything not in agreement with human nature, the nature of the rational and social animal [or], more precisely, not agreeable with the perfection of man as such an animal. Now there is a certain basis for that distinction. By the way, regarding right, I know that is an inconvenient expression, but it cannot be avoided. [LS writes on the blackboard] The Latin word is *ius*: right as a noun. But if it were derived from the Latin adjective, *iustum*, that which is just. Now this is in Greek, [*dikē*], in French, [*droit*], in Italian, *diretto*, and in German, *recht*. Of course this *recht* is linguistically the same as the English "right." In English usage, this wide meaning of right has been lost, but with a minimum of intellectual effort you can overcome this minor difficulty.

There is a connection between right properly [i.e., narrowly] understood and right widely understood and the distinction made by Aristotle in the Fifth Book of the *Ethics*. Let us first look at the Aristotelian distinction. Aristotle makes a distinction between two kinds of justice—and let us say between two kinds of right, to make it quite clear. Now first, justice may be a complete, comprehensive virtue which deals with all actions of men insofar as they relate to another man. Virtue has to do with everything done with a view

toward others, or with everything[6] belonging to the province of law. Aristotle does not make here a distinction between natural, divine, and human—simply law, in other words, the law of the city. This is a comprehensive virtue. The law commands us, for example, to pay our taxes, not to steal or defraud, not to desert especially in front of the enemy, not to commit adultery, and quite a few other things. All virtues are in a way[7] [contained] in justice, but then there is also justice in a narrow sense, where justice is understood not as a comprehensive virtue but as[8] one virtue among many, and this has been divided by Aristotle into distributive and commutative justice.

Now how is Grotius' distinction related to Aristotle's distinction? Grotius seems to claim in one passage that he means the same as Aristotle. Grotius' point of view is surely not identical with that of Aristotle, and you find a simple proof of it if you read in the Prolegomena, paragraph 44, where in his general criticism of Aristotle he takes up that issue. He still takes issue with the fundamental assertion of Aristotle that virtue is a mean.

Reader: "That this basic principle when broadly stated is unsound becomes clear even from the case of justice. For, being unable to find its[ii] passions and acts resulting therefrom and[iii] too much and too little opposed to that virtue, Aristotle saw each extreme in the things itself[iv]—"

LS: In the things—in other words, in the case of anger, there is too much anger and too little anger. Both are faulty in different ways. But in the case of justice, Aristotle could not find a passion which you indulge either too much or too little and therefore wrong[ly]. He said he finds it in the things, so that you demand too much money or land or too little.

Reader: "In the first place, this is simply to leap from one class of things over into another class, a fault which is rightly censured in others[v]—"

LS: Going over into another genus, but *a priori* Aristotle is a better logician than Grotius.

Reader: "then, for a person to accept less than belongs to him may in fact under unusual conditions constitute a fault, namely in view of that according to the circumstances, he owes to himself and those dependent on him;[vi] but in any case the act cannot be at variance with justice, the essence of which lies in abstaining from that which belongs to another."

[ii] In original, not "its"; "in."
[iii] In original, not "and"; "the."
[iv] "For, being unable to find in passions and acts resulting therefrom the too much and the too little opposed to that virtue, Aristotle sought each extreme in the things themselves with which justice is concerned." Kelsey's translation.
[v] In original: "Now in the first place this is simply to leap from one class of things over into another class, a fault which he rightly censures in others."
[vi] Kelsey has: "constitute a fault, in view of that which, according to the circumstances, he owes to himself and to those dependent on him."

LS: In other words, if you demand less than is your right, this cannot be an unjust act, but Aristotle never says it is. Aristotle would say: I'm not responsible for the fact that life is too complicated for a single[9] [rule]. Aristotle finds then a subtle way of showing that justice, too, is a[10] [mean], in a different way. I want for me too much of the good things, and too little of the bad things—too much income and too little taxes would be a good definition of an unjust man.

Reader:

> With equally faulty reasoning Aristotle tries to make out that adultery committed in the burst passion,[vii] or a murder due to anger, is not properly an injustice. Whereas nevertheless injustice has no other essential quality than the unlawful seizure of that which belongs to another; and it does not matter whether injustice arises from avarice, or lust, from anger, or from ill-advised compassion;[viii] or from an overmastering desire to achieve evidence,[ix] out of which instances of the greatest injustice constantly arise. For to disparage such incitements, with the sole purpose in view that human society may not receive injury, is in truth the concern of justice.[x]

LS: Here Grotius seems to miss a point. Whether this fellow committed adultery from lust or because he was paid for it is of no concern, because committing adultery should be punished accordingly. Now what is the point which Aristotle has in mind? Grotius' point, which he reasonably makes, is this. Aristotle would say: Yes, if you take injustice in the wide sense of the term, it does not make any difference because both transgress the law, but it does make a great difference regarding the special justice, justice in the narrow sense. Aristotle's distinction between the two kinds of adultery has nothing to do with the concern to separate this [inaudible] of law from that which is not proper law, but with another point which is very important, namely with bringing out the peculiarity of—and let me state it negatively—dishonesty. Dishonesty is a convenient present-day term for injustice as Aristotle means it.

Now, for example, if you say of a fellow that he is dishonest, you mean something different than if you say he is a coward, or he's intemperate, or he is rude, or he's unfriendly. [In]justice in the narrower sense[11] is exactly dishonesty, and Aristotle wants to make this clear. This more subtle interest, and not far-fetched subtle interest, we all know.[12] We discuss a student or faculty member, and we have to discuss his virtues and vices, and we have to bring up such things. Dishonesty has a certain graver character, generally speaking, than a man who is intemperate but not dishonest. Intemperate is also a problem, but not this great problem which dishonesty is. It is necessary to understand dishonesty as such in contradistinction to the other vices, and that means justice in the narrow and strict sense in contradistinction to other particular virtues. This of course has nothing to do with the fact whether the[13] [legislator] makes any distinction between

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[vii] "By equally faulty reasoning" begins the passage in the translation. The translation has not "the burst passion" but "a burst of passion."
[viii] In original, not "or lust"; "from lust."
[ix] In original, not "evidence"; "eminence."
[x] Prolegomena, 44.

adultery committed from lust or adultery committed from [inaudible]. Judges point out in Anglo-Saxon countries that there are some [criminals] which are particularly disgusting, but there is no legal ground to punish[14] [them] more severely than someone who committed a similar crime, but [is] not in the same way disgusting.

But still, Aristotle's justice in the narrower sense has in itself a closer connection with law than the other virtues, than the other particular virtues. I leave it at that. What did I omit that should be brought out?

Student: I just was wondering why or how[15] expletive justice is different[16] [for] Grotius.

LS: That's a more special case. All right, let us take up the main point. Let us follow the argument and we will come to that.

Now in the beginning of the first chapter, Grotius says why he speaks of war rather than of peace. After all, the title is *The Right of War and Peace*. Would it not be nicer to say[17] *The Right of Peace and War*? Now the argument of Grotius is not very convincing, because he implies you cannot speak of war without speaking of peace, but this of course also goes the other way around, and therefore it is not a good argument. Grotius tacitly presupposes a certain primacy of war. At the very least, the subjection of war to law is surely[18] [a] more difficult task than to subject peace to law. Then he speaks of the difference between war and peace and makes it clear that war is not merely the actual fighting, of course, but a status, a state, a condition in which the two human groups are. Hobbes, I believe, makes it somewhat clearer than Grotius by saying that this refers to times—in other words, from the beginning of hostilities until the treaty or truce. But the main point is clear: that no one understands by war merely the fighting.

Grotius speaks here also of private war, and he says here fundamentally that it has the same character as public war. Private war is a war between individuals or, for that matter, between a state and an individual. For example, someone might build a yacht or some more serviceable vessel for piracy. This is not a public war because it[19] [is] not [a] conflict between states. This, by the way, is a clear sign that Grotius does not merely deal with international law, but also public laws.

Now we come to these very great passages, paragraphs 3 to 8, the various meanings of right.[xi] The first meaning is that right is that which does not conflict with the nature of the society of rational beings. Now clearly hatred conflicts with the society of rational beings because it is a social passion.

But now we come to a derivative meaning which is much more important, because that is in a way trivial to what Grotius said in the beginning—where right refers to persons. In the first case,[20] [he] did not refer to persons, but to characters of actions, characters of things. He defines it more precisely: right is a moral quality, belonging to a person, an individual, to have or do something justly.[xii] What does Grotius have in mind here? He

[xi] *JBP*, 1.1.3-8.
[xii] *JBP*, 1.1.4.

makes the further distinction that if this moral quality is perfect, completed, then it is called *facultas*, and species of that are, for example, freedom, property, ownership, power (power in the sense of *potestas*—right to rule), and if it is less than perfect, then it is called aptitude.

This term in this meaning Grotius did not find explicitly in Roman law. The Roman lawyers speak of *suum*, a man's own, *suum* [*cuique*], one's own, a very untechnical term. But here it becomes a very technical term, *ius* defined in the sense in which he has defined it. Now this right of persons of which he has spoken of is right strictly understood. You remember that Grotius made a distinction between right strictly or narrowly understood and right widely understood. We now make a step forward. The right strictly understood has to do with rights, this word with which we are so familiar—sometimes also called civil liberties—this was a concept which was not so readily available as it became available since the seventeenth century.

Now when you read the discussions, for example, in Thomas Aquinas, you do not find a word, as I remember, on this meaning of right. But in the Thomistic commentaries, say around 1600, the remark is made. I occasionally try to check back this usage, and I didn't come back beyond a Catholic theologian, _____, around 1560.[xiii] I do not now remember the context; it was a simple theological work. But in the late sixteenth century the clear concept of right in contradistinction to obligation was felt to be very necessary, much more than was the case in former times.

To make[21] [clear] to you the importance of these seemingly technical things, I mention the fact that the great revolution effected by Thomas Hobbes a generation after Grotius presupposes this distinction. For Hobbes, the fundamental moral fact is a right in contradistinction to an obligation. In the traditional natural law teaching, it was somehow taken for granted that the fundamental moral facts are obligations or duties, and now this great shift of emphasis from the primacy of obligations to the primacy of rights. We look here as it were into one of the great documents of this great change.

Now the third meaning of right is where right means the same as law, and this was very common. When Caesar speaks of the *ius Gallorum*, then he means the laws and customs of the[22] [Gauls].

To illustrate first the significance of the change, [take] civil rights, what it means. Civil duties are not political issues as such: they may come in indirectly, but this of course is not a matter of the present election campaign. To mention a famous book title: *The Rights of Man*. The earliest place where I found the title, the rights of man, is in Hume's *History of England*, but that doesn't mean anything because there are so many things which are expressed. The traditional term, the key term, was natural law, and my older student[s]

[xiii] A significant literature has subsequently appeared tracing the rise of individual or subjective right out of the natural-law tradition of Scholasticism. See, *e.g.*, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), and Brian Tierney, "Natural Law and Natural Rights Old Problems and Recent Approaches," *The Review of Politics* 64 (2002): 389-406. The theologian Strauss refers to may be Luis de Molina.

will forgive me for repeating this pedagogical trick. [LS writes on the blackboard] Two changes: natural [law] and, more immediately important to us, law[23] [versus] right.

What he calls the peculiar libertarianism—and I don't mean it now in the sense that it is now used, conservatives are as libertarian today in the deeper sense as are the liberals. I give you a simple illustration. In Aristotle's *Ethics*, 1138a7, we find the remark: "what the law does not command is forbidden." The more commonsensical view is that [what] the law does not command,[24] it permits. But Aristotle states here the principle of ancient law: everything is controlled by law. So to speak, you have no rights, [rather] what we would say as doing one's duty. I don't know whether there is anyone among you who had an old-fashioned Jewish training—he will understand me immediately. When Socrates says in his *Apology*, "I am just in defending myself," it is absolutely impossible to say: Does he mean I have the right to defend myself, or is it my duty? Probably the emphasis is more on duty than on right. The mere fact that the distinction is not made is very interesting.

Now for practical purposes and such, such distinctions [between right and duty] had to occur in ordinary law. That goes without saying, but it did not become a matter of principle over all *jurisprudentia* or philosophic consideration. We can say everything is subject to the law, so what the law does not command, it forbids. A modern commentator whom I read says[25] [this] is absolutely absurd. Where does the law command you to breathe or to eat, but clearly the law, at least [at the time] [of] Aristotle,[26] forbade you to commit suicide.[xiv] They needed you as a soldier, a taxpayer, and so on, and by implication you did not do what you were entitled to do by eating and sleeping, but you did your duty. It is possible to understand human life this way.

I give another illustration. When Averroes, twelfth century, wrote a book about the freedom of philosophy—whether men or some kind of men are free to philosophize—the overall consideration is [that] these and these men are under a duty to philosophize.[xv] When Spinoza tried to redo that in the seventeenth century, he speaks of the right to philosophize. This is one of these subtle changes which have occurred and which have infinite consequences and therefore must be carefully considered. We can say from the older point of view that there is no evident necessity for a sphere of freedom, for a private sphere in the sense of I can do or forbear what I damn well please. That does not mean that they were opposed to private property. Aristotle was very much in favor of private property, but even regarding[27] property, you are not free in the sense that you may use or misuse your property as you see fit. There are spheres, like relaxation, which human life absolutely needs, but this relaxation in itself can be understood as a kind of duty because you need it to recover your body to continue working and so on. So this great change finds some documentation in this passage of Grotius.

[xiv] In the example given by Aristotle in the passage cited from the *Ethics*, the law does not permit suicide, therefore it forbids suicide.

[xv] Averroës, *The Book of the Decisive Treatise Determining the Connection Between the Law and Wisdom*, trans. Charles E. Butterworth (Provo, Utah: Brigham Young University Press, 2001).

By the way, what is the technical definition of right in present-day American law? How do the American lawyers now define right? Say, the right of ownership, or the right of war, or whatever it may be. It is not something which is very much discussed.

Student: It would be the obligation on the part of others to respect it.

LS: But how can they respect something which they don't know? In other words, the rights are defined individually. That is sufficient for all practical purposes? It is not necessary to give a definition of right?

Student: You would say generally that it is a respect for certain objects, whatever they are.

LS: And then the objects include or are rights.

Student: Not the objects themselves, but the prerogative on the part of the subject to exercise the prerogative.

LS: Then of course prerogative is only a much more special word than right. Prerogative is in itself a very special right.

Student: It leaves the option for what is exercised.

LS: Surely, that's a fact.

Student: I have a dictionary definition here—the usage from the period 1867 to[28] [1883]. Do you want me to read that?

LS: Yes.

Student: It is: "A well-founded claim.[29] [If] people believe that humanity itself establishes [or proves] certain[30] [claims] either upon[31] [fellow-beings] or upon society and government, they call these claims human rights;[32] [if] they believe that these claims[33] [inhere in the very nature of man himself, they call them inherent, inalienable rights]."[xvi]

LS: I believe one would have to go at least one step beyond that: that right is a just claim, because a claim as such is not a right. Is this all right for practical purposes?

Student: I'm not sure about the just part of it.

LS: A legally recognized right, then?

[xvi] The student reads from John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union With References to the Civil and Other Systems of Foreign Law* (Philadelphia: J.B. Lippincott & Co, 1883), s.v. "right."

Student: You see a situation where you say a man has a right to do this, but in doing it he is a bad man. Do you know what I mean? That would be perfectly possible in American law. A man would have a right to do a certain thing, yet you would call him unjust.

LS: That comes also out here later in Grotius. We will come to that. When Grotius makes here the distinction of the two kinds of "moral qualities belonging to a person to have or do something justly," he distinguishes between the perfect right, which he calls *facultas*, faculty, or if it is not perfect, then of course it is aptitude. That is the distinction. Commutative justice, to use the Aristotelian term, deals with faculty, while aptitude is the object of distributive justice.

Now here we have another point. Right in the strict sense of the term deals with rights, rights of course of other human beings; therefore its sphere is identical with that which Aristotle called commutative justice, not distributive justice. Now what does this mean? What is commutative justice? What does commutative justice comprise in Aristotle?

Student: He calls it justice of the law courts, that is, between parties to a contract. Men taken as equals, or as having obliged themselves to not take[34] [merit] into consideration.

LS: There are two spheres. The first is exchange proper: buying, selling, and all other transactions of this kind, where it is understood that there must be some justice. But Aristotle strangely regards penal law also as belonging to commutative justice because you commute, say, the loss of your eye, with the punishment, and not merely the civil punishment but the punishment proper, of the other party. In other words, all exchange and all penal law[35] [properly] understood—that is commutative justice.

Distributive justice has a variety of layers. I limit myself to one, the most interesting: to distribute the offices which the polis has to distribute to the worthiest men. For a dogcatcher, other qualities are required than for the president, of course, but distributive justice is concerned with the worthiness, with the merits, of the individuals to whom the things are adjudicated. From Grotius' point of view, distributive justice falls wholly outside of the sphere of right strictly understood. Right strictly understood has to do only with commutative justice.

Student: Is the understanding of Grotius' expletive justice fully equivalent to what Aristotle means by commutative justice?

LS: I couldn't answer the question, at least nothing struck me particularly. Was there anything which struck you?

Student: The distinction was the enforceability of the right, whereas for Aristotle is there anything to say that man has less a claim to an office, for instance if he inherits the office, than he has to get his money back?

LS: No. Let us start with simpler things with which I have had more experience than high offices. If the university appoints a man, it may very well commit a gross injustice. It is supposed to appoint the best available men, and it happens often, not only for reasons of ignorance but for reasons of spite, that there sometimes is an unjust action. Now whether this man who has not been given the job has the right to sue, that is for Aristotle a wholly uninteresting question compared to the moral question. These men who deprive him of what belongs to him were as great crooks as if they had stolen silver spoons, in a way perhaps more. But Aristotle would of course say that maybe the law should not interfere with that because the law is too crude for that. You can't have cops sitting around at faculty meetings;[36] they would be[37] less competent, and the judges less competent [still]. It is obvious for commonsensical reasons these things cannot be legally possible, but morally, if someone votes out of spite against the best candidate for an appointment in the department, he is of course a crook. I mean, who can doubt of that? This is what Aristotle means. So distributive justice is[38] [as] essential [a] part of justice as commutative justice.[39] From the technical point of view of impossibility and so on, the distinction is plausible, but still the moral horizon is narrow, when the consideration of distributive justice is more or less relegated[40] [to] limbo.

Now you might read in Hobbes's *Leviathan*, chapter 15, in the Blackwell edition, page 98, [an] explicit rejection of distributive justice. You find a more expansive statement in Rousseau's *Discourse on the Origin of Inequality* in the final note,[xvii] which unfortunately is not available in any English translation. He says the magistrate is judge only of right rigorously understood. In the matter of manners or morals, the law cannot fix sufficiently exact measure[s] which could serve as the rule for the magistrate. To judge persons as distinguished from actions is outside of the province of law. There are certain subtleties which Grotius discusses in the sequel, for example this: Natural right is of course immutable even by God, but God also confirms the natural right in the Scripture.

Let me come to another point. In paragraph 12, Grotius raises the question: How can one prove that something is a provision of natural right? Then he says this can be done in two ways, *a priori* and *a posteriori*. Now *a priori* and *a posteriori* do not have at that time the meaning which they have now. The present usage goes back decisively to Kant.[41] [For Kant, *a posteriori*] means based on experience, and[42] [*a priori*] that which precedes all possible experience. Here *a priori* means from the side of the cause, and *a posteriori* from the effect.

[xvii] "[N]o society has ever existed . . . in which no difference between evil and good men was established; and in matters of morals—where the law cannot establish an exact enough measurement to serve as a rule for the magistrate—the law very wisely, in order not to leave the fate or rank of citizens at his discretion, forbids him the judgment of persons, leaving him only that of actions. . . . The magistrate is judge only of rigorous right; but the people are true judges of morals . . . ." *Discourse on the Origin and Foundations of Inequality*, in *Rousseau: The First and Second Discourses*, trans. Roger D. and Judith R. Masters (New York: St. Martins, 1964), 227-28.

The stricter proof is the *a priori* proof, namely, the argument, is something[43] in agreement with the[44] [rational] and social nature. Rational and social nature requires this and this; hence it is a[45] [precept] of natural right. The *a posteriori* is a popular procedure, namely, what all men or at least all civilized nations agree upon can be presumed to be of natural right. Say if intercourse between parents and children is rejected by all civilized nations, then we must presume that this has a ground in human nature itself as natural right.

But of course one must say there is one difficulty. The *a posteriori* proof, as Grotius calls it, makes it difficult to distinguish between natural right and *ius gentium*, *i.e.*, a voluntary right, a positive right, which grows up everywhere. Therefore the *a posteriori* proof was then rejected. Here again the key man is Hobbes. One point is simple. Civilized nations—first, what is your standard for civilization? You must know that in advance in order to investigate it.

The passage in Hobbes is in *De Cive*, *The Citizen*, chapter 1, paragraph 2, if I remember well. No, it is not. But it is somewhere in the second chapter.

There is one term which occurs here in paragraph[46] [12] on which we might dwell for a second. Chapter 1, paragraph[47] 12, where he uses the term *sensus communis*, on the basis of a Latin text—what is agreed upon by common opinion. I'm sorry, but I cannot find it now. I would like to say that this *sensus communis*, common sense (it comes from Latin; there is no word in Greek for that) has here not the meaning which it has now, because the meaning which it has now is a reaction to the consequence of modern science. Generally speaking, modern natural science and its daughters claim to be the only competence, and somehow there is a certain awareness that man has knowledge of human things without science, and this we then call common sense. So our concept of common sense is defined negatively against scientific knowledge.

The original meaning is very different. Aristotle also used the word common sense, but there it has nothing to do with this.[xviii]

Reader:

> Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature; proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling which is called the common sense of mankind.[xix]

[xviii] Reference may be to *De Anima* 3.1-2.

[xix] The tape was changed at this point; the quoted text is not in the original transcript and has been inserted from *JBP*, 1.1.12.1.

LS: This goes back to the Roman writers, and it is essential for[48] [them] that it has to do only with practical matters, matters of prudence, of necessity. It has no theoretical indications. This is only in passing.

Now a last point in chapter 1, paragraph 14. He gives the definition of what we call the state, naturally because he has to speak of all kinds of law, one of them being human law, and human law is given by states, in Latin *civitas*. Now this definition of the state given is simply traditional, a combination of Cicero's *Republic* and[49] Aristotle, and this is only further proof that Grotius in the main follows the tradition. Let us now turn to the second chapter, because that contains some very important information. I would not like to pass over any questions.

Student: When I was reading this, I was confused when he was talking about divine law and its relationship to natural law.

LS: That is probably in the first part.

Student: He says that it is unchangeable, that even God can't affect natural law, but then he says that the appearance of change—

LS: All right, but is it not very simple?

Student: It is very simple until he says that God can order someone to kill someone.

LS: Killing is such an awful thing, especially in Chicago. Let us take another example. The Jews were commanded to take away the stuff from the Egyptians at the time of the Exodus, and this did not command theft or robbery; and the traditional answer which you will find in Thomas, for example: this was not theft because any man's domain is with God, and if God says this belongs with you, to A and not to B, then it no longer belongs to B. And in addition, it was nothing but the unjustly kept back wages for the slave labor, [taken from those] who didn't need it. The same would apply even to the case of killing. God commanded [inaudible] Abraham to kill Isaac.

Student: But isn't it a little different distinguishing it from Aquinas? I have the feeling that Grotius is trying to set up such an absolute category for natural law, because Aquinas has this sense of different levels of law. There does not seem to be this absolute distinction.

LS: As far as the evidence that we have discussed hitherto, we cannot go beyond the fact that Grotius wishes to make the independence of the natural law, from not only human law but also from the divine law, much more visible than traditionally.[50] That doesn't necessarily mean a break in principle, but[51] in my experience I have found that[52] [these] seemingly formal changes are more than formal. Why is he no longer satisfied with this easygoing manner in which this matter was handled in the Catholic tradition of his time? Why does he want to have this natural law, not only with the peculiarity and the unchangeable manner of the natural law—but there is one reason connected with his

subject. International law [is] a law binding not only Christians, but Muslims and pagans. Now they [non-Christians] cannot be approached on the basis of the Christian law, or for that matter, of the oldest law[xx], they can only be approached on the basis of what human reason tells everyone, and therefore this is a close connection between international law and natural law. In the intra-national things, you can say there you have the positive law, which is usually specific enough for most purposes, but in relations between entirely different states or entirely different cultures, what common ground can there be except man's common humanity, and this common humanity expressing itself in man's common reason?

Now the second chapter deals with the question on whether waging war can ever be just. Of course, this has to be discussed on all levels in the case of natural law. Let us read the beginning of the first paragraph.

Reader:

> Having seen what the sources of law are, let us come to the first and most general question, which is this: whether any war is lawful, or whether it is ever permissible to war. This question, as also the others which will follow, must first be taken up from the point of view of the law of nature.

LS: Of course, in Latin it is always *ius*.

Reader:

> Marcus Tullius Cicero, both in the third book of his Treatise *On Ends* and in other places, following Stoic writings, learnedly argues that there are certain first principles of nature—"first, according to nature," as the Greeks phrased it—and certain other principles which are later manifest but which are to have the preference over those first principles.[xxi] He calls the first principles of nature those that according to which every animal[xxii] from the moment of its birth has regard for itself and is impelled to preserve itself, to have zealous consideration for its own conditions and for those things which tend to preserve it, and also it springs from destruction and those things which are likely to cause destruction.[xxiii] Hence also it happens, he says, that there is no one who, if the choice were presented to him, would not prefer to have all the parts of his body in proper order and the whole rather than dwarfed or deformed;[xxiv] and it is one's first duty to keep oneself in the condition which nature gave to him,[xxv] then to hold to those things which are in conformity with nature and reject those things which are contrary.[xxvi]

[xx] The law of Moses.
[xxi] Grotius here cites Cicero, *On Ends* 3.5.17. See also *On Duties* 1.4.11.
[xxii] In original, not "those that according to which"; "those in accordance with which."
[xxiii] In original, not "and also it springs from destruction"; "and also shrinks from destruction."
[xxiv] In original, not "in proper order and the whole"; "in proper order and whole."
[xxv] In original, not "and it is one's first duty"; "and that it is one's first duty."
[xxvi] In original, not "which are contrary"; "that are contrary thereto." *JBP*, 1.2.1.1.

LS: More literally,[53] the first *officium*, which is not exactly the same as duty. Duty comes from the Latin *debere*, what we owe, and this is absent from the Latin word *officium*, which means something more like proper than common. But I do not want to go into this subtlety. The first *officium* is that everyone preserve himself in the state of nature ([this] is the literal translation), namely, the state of a healthy living being. The question of the state of nature will concern us very much in this course, therefore I draw your attention to the first [appearance]. This is the old meaning: the Stoic, Aristotelian, Platonic meaning. The state of nature is the state of perfection, of at least the initial perfection. Health rather than sickness, life rather than death, seeing rather than blindness. This is only in passing, but it is not unimportant because of the enormous importance of the question of the state of nature later on.

Here he refers to a distinction made by the Stoics and accepted by Cicero between the *prima naturae*, the first things of nature, and what we can simply call the ends, the perfection of man, and since there is this fundamental distinction we must have a twofold consideration. We must consider, in the case of natural right: Is it in agreement with the *prima naturae*, or is it in agreement with the end, the natural perfection of man? The chief example is self-preservation: preservation of living beings, which we share with the animals, of course, and this is the point.

In connection with what we have heard regarding the distinction between right in the strict sense and right in the[54] [narrow] sense, we cannot really draw this inference, that only the former considerations fall within the province of right strictly understood. In other words, what man owes to himself, to himself as a rational being in a way which does not directly affect the others, is not a matter of right strictly understood, whereas his self-preservation and of course the self-preservation of everybody else, this is such a matter for right.

In the Declaration of Independence there occurs a ringing phrase at the end, that we pledge our lives, our fortunes, and our sacred honor. This is such a beautiful sentence that one hesitates to analyze it, because obviously they pledged their lives and their fortunes in a different way than they pledged their honor. They are willing to sacrifice their lives, they are willing to sacrifice their fortunes, but they are not willing to sacrifice their sacred honor, obviously. Now this must be connected with another fact. At the beginning, the fundamental rights are the rights of life, not explicitly of fortune, but one can say that is implicit in liberty [inaudible]. So the strange thing is that this document, which starts from the rights of lives and fortunes, culminates in a willing[ness] to sacrifice. This paradox is exactly the one which Cicero knew and which Jefferson and the others, being educated men, knew of course also from this passage in Cicero and other places. So what is first, what comes first, what is in that sense fundamental, is not the highest and the most authoritative. This simple thing—well, of course, Plato and Aristotle are the great philosophers, but it is clear to the meanest capacity if we think of these simple things from the beginning to the end of the Declaration of Independence. Some things are fundamental and yet they may have to be sacrificed. Other things are not fundamental in that sense. There is no right to sacred honor as there is a right to life and liberty.

But I believe the main point which we must keep in mind for the whole argument of this work is that there is a connection between the two meanings of right, right in the narrower sense, and right in the strict sense with which Grotius is much concerned, and this distinction between the beginnings, as we can say, and the end. Right in the strict sense has to do with the protection of the beginnings, or rather with the protection of the rights arising from the beginning.

In paragraph four, Grotius speaks of what the right of nature teaches from the point of view of the beginnings, of these elementary things which men share with the animals. It is simple: nature has supplied all animals with weapons of offense and defense; nature does not disapprove of war. The nice animals who have no claws and what not, they have speed instead. A rabbit is much nicer to have at home than a lion or a tiger, but even the rabbit is fitted by nature for war by being fitted for running away, which is one way of overcoming dangers.

The higher consideration—perhaps you can read the beginning of paragraph 5.

Reader: "Right and reason moreover, and the nature of society, which must be studied in the second place and are of even greater importance, do not prohibit all use of force but only that use of force which is in conflict with society, that is, which attempts to take away the rights of another."

LS: You see here this higher consideration, which is concerned[55] not with that which every animal desires from the moment of birth, but with the highest: even that[56] does not oppose [war]. I'm not concerned only with the decision regarding war, but with the distinction between these two considerations. War is legitimate from the point of view of the beginnings of men as well as from the point of view of the highest of men. This is the first point which Grotius tries to make.

There is however in here a minor difficulty,[57] [and] I do not see whether Grotius faces it. He speaks here of the nature of society, but what is the purpose of society, and he says here in the sentence immediately following—

Reader: "For society has in view this object, that through community of resource and effort each individual be safeguarded in the possession of what belongs to him."[xxvii]

LS: With a slight overstatement, the purpose of society is to secure to everyone what is his, and the things mentioned here are life, the members of the body, and liberty. Hobbes, in a parallel passage, speaks only of life and members of the body. Now if this is the purpose of society, to secure to everyone what is his, then the question arises: Does society ever rise beyond the level of the satisfaction of the primary needs?

But the difficulty with which Grotius is concerned in this chapter is this one. This concerns not the natural right, because at this time no one to speak of had opposed war on

[xxvii] *JBP*, 1.2.1.5.

rational grounds alone. That war is bad, all sensible men agree. But the question is, is waging war an unjust action as such, and this was never entertained by Grotius. Philosophic pacifism, if I may say so, comes up in the modern century on the basis of course of the right to self-preservation absolutized. If the fundamental right is the right to self-preservation, for the sake of which civil society exists, then civil society cannot under any circumstances demand from you that you expose your life. This can be presented in a, how should I say, a more appealing manner, but I think without this hard Hobbean underpinning, it would not have acquired the part which it has.

So the difficulty does not lie in the sphere of reason or of natural right. The difficulty concerns the Bible, the divine law. In principle, the divine law might have forbidden generally what the natural right permits. Quite a few think, for example, that polygamy, as he will say later on, is not forbidden by natural law, but it is forbidden by divine law. So the serious question is: Did the divine law in fact forbid war? First, the Old Testament, and that is a relatively simple discussion in paragraph 5—Grotius discusses only one law, not the Mosaic law, because the Mosaic law as[58] it is understood [here] is addressed to Jews and does not refer to non-Jews. He discusses the law addressed to all men in a sense [according] to the Bible and surely according to the Jewish tradition, the law given to Noah and his sons after the flood, Genesis 9, verses 5 and 6. Grotius says here, I don't see how warfare is forbidden here; by implication it is even commanded. But of course he would never quote, as I have seen it quoted in some pamphlets, "Thou shalt not kill," and not only on the ground that this was addressed strictly speaking to the Hebrews and therefore not applicable to other people, but on a much more solid and a more interesting level. Why is there this absurd argument against war, I mean as a scriptural prohibition? For the same reason for which[59] there is an absurd argument against capital punishment.

Student: Non-Christian.

LS: No, apart from that. One could say that is somewhat far-fetched. Thou shalt not kill, and yet people kill with the feeling that they act not only justly but piously.

Student: It is addressed to the individual acting on his own authority.

LS: No such distinction is made in the text of the Ten Commandments. Very simply: the commandments to wage war, and especially the commandments to kill for certain specified crimes, abound. Moses surely cannot have been so foolish to forbid something which he commands all the time. That is a gross impossibility. That is clear. Incidentally, the Hebrew word used in the text is not thou shalt not kill, but thou shalt not murder. The word for killing is a different word, and therefore that is wholly irrelevant.

The difficulty is caused by the New Testament, to which he turns in paragraph six. Now here there are two opposite views with which Grotius is confronted. In the first place, the New Testament contains only the natural right. Hence the question whether the New Testament permits self-defense, and therefore war does not arise. If the New Testament teaches the natural right, and the natural right teaching demonstratively permits war, that settles it.

The other, opposite, view is that the New Testament, and especially the Sermon on the Mount, is only an interpretation of the Mosaic and natural law, meaning now this is the true interpretation of natural right.[60] [In other words, what we, and Grotius, ordinarily believe the natural law to say must be corrected in the light of] this most perfect interpretation given by Jesus in the Sermon on the Mount. Then this could lead to the consequence that natural law properly understood, as it was understood only by Jesus, forbids self-defense and hence war.

As I learned from Gronovius, the commentator whom I use here, the second view, that the Sermon on the Mount is only an interpretation of natural law, was the common view of all Protestants, which probably has to be qualified a bit. These were after all reasonable contemporaries who don't talk simple nonsense about what is going on. The point which he makes is this, that the Protestants are distinguished from the Catholics by the fact that they deny that there is a new law—the old law of Moses, and the new law of Christ. From the Protestant point of view, grace, the [inaudible] message of the New Testament, is opposed to law, and therefore there cannot be a new law. What the New Testament contains, which looks like law, is simply an interpretation of the old law, and of course the highest [interpretation].

This has nothing to do with our present discussion, but it is important for later, in paragraph 6, the second section, but we can read the first two sections.

Reader:

> The arguments against war which are drawn from the Gospel have greater plausibility. In examining them, I shall not assume, as many do, that in the Gospel outside the ordinances relating to belief and to the sacraments there is nothing which does not belong to the law of nature. For I do not think that this is true, at least in the sense in which most people take it.
>
> I willingly recognize the fact that in the Gospel nothing is enjoined upon us which does not have the quality of natural moral goodness, but I do not see why I should grasp that we are not bound by the laws of Christ beyond the limit of obligation imposed by the law of nature of and by itself.[xxviii] It is amazing to see how those who think differently labor in the effort to prove that things which are forbidden by the Gospel are not permissible by the law of nature, as concubinage, divorce, and polygamy. These things in fact are of such a nature that reason itself declares that it is morally better to abstain, but they are not such that wickedness would be manifest in them without divine law. Again, who would say that we are bound by the law of nature to do that which the law of Christ enjoins, that we expose ourselves to the danger of death for others (1 John 3:16)? Pertinent is the saying of Justin: "To live according to nature is the problem of him who has not yet become a believer."[xxix]

[xxviii] In original, not "why I should grasp"; "why I should grant."
[xxix] *JBP*, 1.2.6.1-2.

LS: In other words, for those who are not Christians who are indirectly addressed in this book, this cannot be valid. But we keep this in mind for later discussion, that concubinage, divorce, and polygamy are not against natural law. This is one of the ironies, and we will find others, which come up the moment the question is raised what precisely is it that natural reason teaches [inaudible].

In the sequel he discusses the Christian argument against war, or allegedly the Christian argument against war as such, based on the famous passages in the Sermon on the Mount. He tries to show in each case what we now call the pacifist interpretation is simply a misunderstanding. We can read section 10 in paragraph 8 which states, I think, quite clearly the principle which he has in mind.

Reader:

> Let us concede then a broader signification of the word "neighbor" to include all men, for all men have now been received into a common dispensation. There are no peoples doomed by God to destruction. Nevertheless, that will be permitted with respect to all men which was permitted then with respect to the Israelites. They were bidden to love one another, just as now all men are.[xxx]

LS: It isn't fair. In other words, the great Gentiles who made the command to love the neighbor meant originally according to Grotius to love fellow Jews, and here in Christianity it means fellow men in general. What is the consequence?

Reader:

> And, if you wish to believe also that the greater degree of love is commanded in the law of the Gospel,[xxxi] let this too be granted, provided also the fact is recognized that love is not due to all in the same degree, but that a greater love is due to a father than to a stranger. In like manner also, in accordance with the law of a well-ordered love, the good of an innocent person should receive consideration before the good of one who is guilty, and the public good before that of the individual.
>
> Now it is in the love of innocent men that both capital punishment and just wars have their origin. Reference may be made to the moral sentiment expressed in Proverbs 24:11. The teachings of Christ in regard to loving and helping men ought, therefore, to be carried into effect unless a great and more just love stands in the way. Familiar is the saying:[xxxii] "it is as much a cruelty to spare all than to spare none."[xxxiii]

LS: So this is then the principle: that the love of neighbor is perfectly compatible with the distinction of the degrees of love to be given to different human beings, and granted that, the capital punishment and the just wars that follow.

[xxx] *JBP*, 1.2.8.10.
[xxxi] In original, not "the greater degree of love"; "a greater degree of love."
[xxxii] In original, not "the saying"; "the old saying."
[xxxiii] Seneca, *On Clemency* 1.2, quoted in *JBP*, 1.2.8.10.

At the end of section fourteen, there is a paragraph which I have not quite understood.

Reader:

> A fifth passage, which some make use of, is in 2 Corinthians 10:3. "For though we walk in the flesh, we do not war according to the flesh; for the weapons of our warfare are not of the flesh, but mighty before God to the casting down of strong posts," and what follows.[xxxiv]
>
> This has no bearing on the point under discussion, for the passages which precede and follow show that by the term "flesh" in that connection, all understood a weak condition in his body,[xxxv] of the sort that attracted attention and brought him into contempt. To this Paul opposed his own weapons, that is, the power given to him as an apostle to restrain the refractory, such as he made use of against Elymas,[xxxvi] against the Corinthian guilty of incest, of Hymenaeus, and Alexander.[xxxvii] This power, then, he says, is not of the flesh, that is, weak; on the contrary, he declares that it is most mighty. What has this to do with the right to inflict capital punishment, or to wage war? Nothing whatever. Because the church at that time was without the backing of public authorities, for its protection God had called forth a supernatural power;[xxxviii] that power, again, began to fade about the time when Christian emperors came to the support of the Church,[xxxix] just as the manna failed when the Jewish people leased the fertile lands.[xl]

LS: In other words, what was originally miraculous became then natural. He discusses the situation of the early Christians with a view to the Roman Empire—in chapter 2, or does that come up later?

Student: I believe that is in chapter 2.

LS: But isn't there a later passage—oh, that has to do with the question of the resistance to the government.

Now the first point I would like to make—what point with which you were concerned was not made in our survey now and should be made?

[xxxiv] In original, not "'strong posts'"; "'strongholds.'" The words "and what follows" are marked inaudible in the original transcript.
[xxxv] Kelsey renders the phrase: "Paul understood a weak condition of his body."
[xxxvi] This name was marked inaudible in the original transcript.
[xxxvii] In original, not "of Hymenaeus"; "Hymenaeus." The names "Elymas" and "Hymenaeus" are marked inaudible in the original transcript.
[xxxviii] In original, not "a supernatural power"; "that supernatural power."
[xxxix] In original, not "began to fade"; "began to fail."
[xl] In original, not "leased the fertile crescent"; "reached the fertile crescent." The words "leased the fertile" are marked inaudible in the original transcript. *JBP*, 1.2.8.14.

Student: Grotius made the statement that to understand the words of Christ, we had to have considered the twofold condition in the law of Moses, what it had in common with laws merely human, what it had in common with spiritual law. The commands of Christ in that view seem to take laws that are human or resemble human laws, and turn them into something more than that. In other words, it is not sufficient[61] to murder, but one must have the anger, and instead of the application of visible punishments, there is the threat of the final supernatural[62] [punishment].

LS: And what conclusion did you draw from that?

Student: Whether the teachings of Christ in this respect broke down that division in the law of Moses.

LS: But only on the condition that from the Christian point of view, temporal government is impossible. Would it follow otherwise? And that of course he never says. I do not know; perhaps you would have to elaborate your point. I thought the discussion of this point was very interesting to me because it is an old story, the discussion has been going on for some time. It became more lively because of the spreading of sects in the late sixteenth and seventeenth centuries, some of them quite pacifist, as you know: the preparation of the Quakers began at that time, especially in Holland. The Mennonites who prepared many of these later things . . . therefore it had a very great topicality which it didn't have for a very long time.

Now regarding the other points—this complicated relation to Aristotle, which is only externally complicated. Is this now clear? The Aristotelian distinction between justice in the wider sense, where it comprises everything which concerns men's relations with other men as such, in other words, which is the kind of justice which is not identical, but should be identical, with obedience to law. Why is it not identical, and why should it be identical? That's of some importance.

Well, the laws are frequently very imperfect, and if the laws were well-made according to circumstances, then one could say simply to act justly means to act according to the law. This broad meaning of justice, where justice is meant to be co-extensive, law-abiding, this is justice in the wider sense. But then there is also justice in the narrower sense, where it means a special kind of human virtue, an excellence of man, which like all excellence is in a way part of justice in the broader sense but which nevertheless is a particular virtue as temperance, or courage, or[63] [liberality] or whatever else. This is in a way the starting point of Grotius, as you discerned, but now it is all-important to see what does Aristotle mean by that distinction, and what does Grotius mean by that distinction. It is sufficient if we limit ourselves to Grotius here. Grotius transforms this distinction in such a way as to make possible a separation of what man can be compelled by human[64] [law] to do and can be justly compelled, and those things which cannot be justly compelled. This libertarian concern is absent from Aristotle.

Right strictly understood in the Grotian sense has to do with rights, with the objects of commutative justice as distinguished from distributive justice, and the basis of right

strictly understood are these beginnings, these *prima naturae* in contradistinction to perfection or virtue in the full sense of the term. Would you agree with that? I cannot do better than that. This simple statement which I made now is not made by Grotius, but Grotius says on different occasions this, and this I understand [he means] by right strictly understood. Now if you put these passages together, then you get the formula which I said. But he did not do that, and the[65] [question] is whether Grotius is[66] [groping] for something which he hadn't seen clearly in its totality, or whether he hesitated to present that. That I do not know. I mean, I undergo all kinds of fluctuations in reading Grotius about that point. He makes some [inaudible] which is very instructive for what he means by this distinction between the two kinds of right. Prodigality which is habit if you just waste your money without considering the obligations you have, but if in your spendings you give a hundred-dollar bill or maybe even a thousand-dollar bill to someone, this someone becomes the rightful owner of this thousand dollars, and regardless of whether he needs it or not. You all can see that distinction. What Grotius has in mind—and I'm sure this example was used long before Grotius, it is a simple example made clear—[is] what later on came to be called (not here by Grotius) the difference between law and morality. In other words, whether the man who accepts this thousand dollars from[67] [a] burglar who in addition may be drunk, [or] whether[68] [the] man who accepts the gift is a very nice man, is not a matter. But he surely cannot be punished for that. Of course that would need some reasoning, naturally. Why do we draw this line? I suppose drunkenness would be a legally relevant consideration, whether a man can be presumed to have made a gift when he was drunk; but if he was sober, it is his money and he can do with his money what he wants. There are quite a few other examples. We know from our own experience how plausible the suggestion is that the line should be drawn between law and morality. The interesting thing is only that very many wise men, say, up to the year 1600, who knew these things as well as Grotius and as well as we know them, did not feel the urge for that clear-cut separation between law and morality which was felt very strongly in the seventeenth and eighteenth century and beyond. To that extent again a question of quantity becomes a question of quality or of principle. Why is this so?

One reason is clear. One can see a variety of reasons, for example, to limit the sphere of law very strictly means of course to limit the power of government, and since governments cannot be presumed to be always good and wise, it is a plausible suggestion one should limit it to the absolutely necessary things. That is one point. In addition, we should never forget, although that is theoretically not the most important, since the demands of morality were traditionally understood for practical purposes on the operative level as identical with those of Christianity. The concern with secularization of society, which was going on in the sixteenth and seventeenth centuries, meant in practice also a reinforcement of this desire to draw a line [regarding] what[69] is not subject to legislation, *i.e.*, government, and the freedom of conscience and everything connected with that comes in here.

Student: I'm a bit confused by this sharp distinction between the things which are important to the first principles of nature and the higher things, because Grotius does shy away from a discussion of the law, but when he just mentions it, he says that the part of the purpose of municipal law is to change the good things into obligations.

LS: But preferably, I suppose, in the first place to make stick the rights of the first order, of the first things of nature. Very simply, Aristotle, with classic simplicity, says it is the duty of the city or the government to make the citizens good, and by good he did not merely mean that they do not scream when the Beatles come in town and this kind of thing, but he meant really generally good, sturdy characters. Plato, of course, had the same view. This was a traditional view which could easily be reconciled with scriptural doctrines. The mere fact that virtue properly understood cannot be compulsory because you yourself must have chosen is an impertinent observation—although it has or asserts the authority of John Milton, among others—for a very simple reason. Before you are in a position to choose, you have to grow up; and a three year-old child is incapable of moral freedom properly understood, and therefore it depends very much on how he is brought up. In other words, the great question is the question of education in the wide sense of the word with the emphasis on the formation of character, and this may require severe limitations on the freedom of the parents. From the point of view of the concern of bringing up a good generation, the question of the pictures of the wars in their parents' house, the music they hear there, are obviously most relevant.

Here we have one position, which is theoretically not as easily disposed of as some people think today: that it is the position of government, of the *polis*, to make the citizens good. And then we have the opposite view which says morality and human goodness is of no concern whatever to government. Locke has this position among others, a position which Aristotle knew because he discusses it briefly in the Third Book of the *Politics* when he speaks of certain people who have an arrangement where they pay their debts without any concern for the character of the people. This is not a *polis*. The view that this could be a *polis* was known. This is, I think, a very grave issue for the simple reason because very little of reflection is needed in order to see that the *polis*, or society as we say today, does have an interest in certain virtues. Corruption in high places is not irrelevant to society as society, and so there is a certain civic spirit which I think is generally needed. Or call it patriotism. What is meant by civic spirit or patriotism is the rudimentary form of what Aristotle means by virtue, but it creates a difficulty.

The other difficulty comes in as follows. Every regime, especially democracy, has a certain specific morality, as we can say, certain ways of conduct which were perfectly blameless in other kinds of societies, not necessarily less noble, but simply regarded as indecent: for example, the way in which you treat servants, if you have any. If you make a trip to Europe, you will see the difference, especially the more backward parts.

So the question of morality cannot be thrown out by simply saying the government has no other function but to protect mine and thine. But since it comes[70] [to that], it might be wiser to bust the case wide open, so you would limit yourself to what is obviously admitted as a requirement, say, of a democratic society, and see how these requirements would look from a comprehensive and broad point of view without making any concessions to the situation itself. I'm all in favor of concessions, but I would like to make them intelligent, and it is absolutely impossible to make an intelligent compromise

if you don't know in the first place what you would like to get if you could. Then you can know where you can be conciliatory and where you cannot be.

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[43] Deleted "in convenience."
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[60] Deleted “In other words, so what we ordinarily believe, including Grotius, that what the natural law says, it must be correct in the light of.”
[61] Deleted “enough.”
[62] Deleted “[inaudible].”
[63] Deleted “vanity.”
[64] Deleted “[inaudible].”
[65] Deleted “reason.”
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[69] Deleted “government.”
[70] Deleted “back.”

Session 3: October 13, 1964

Leo Strauss: It shows how difficult it is for someone in a circumstance like myself simply to side with[1] one of these two sides.[i] For crude purposes I have always called myself a conservative, if not a reactionary, because I am not afraid of words, but anyway I think the liberals are much more powerful in the universities. It requires a bit more of moral courage to say that you are not a liberal than[2] [that] you are [a] liberal. This is a purely rhetorical but not altogether insignificant consideration.

You see immediately that things are not so simple if you turn to the question of prayers in schools, where it is exactly the opposite, where the conservatives are in favor of a certain invasion of privacy. There is a great cleavage[3] [within] the conservative camp, if you would read a regularly conservative magazine as I do. There is one school which is strictly Manchester[4] [economics],[ii] I mean, represented of course by Milton Friedman but also by a number of journalists, as Hazlitt and such.[iii] And then there are others where the emphasis is much more on a certain moral obligation, and they feel that the liberals are much too lax. In Senator Goldwater's speeches, both enemies appear from time to time.[iv] So what you said is true up to a point, but it does not exhaust the issue.

Student: I would be willing to put aside the categories and discuss the issue of the Civil Rights Act, because I think it is the most important political issue in the country. If we take just those who oppose it and those who favor it, we would see that now there is a restatement—

LS: But there is another issue which is not covered by the alternative stated by you, and that is the importance of prescription. If you say the liberal view is the radical view, [then] what is intrinsically right must be done right away, regardless; whereas the conservatives say this won't work, that you have to consider a variety of circumstances—something may be intrinsically right but might create great disturbances. If you take this division between the two camps, the situation would be different.

I can only say that one of you, who is not here at the moment, occasionally drew my attention to the fact that my name was mentioned in the *Nation*, which I believe is a liberal paper, because they sense that in one point I do agree with them because I am in favor of justice. As we can learn partly from Grotius,[5] [this leads] sometimes to complications. What degree of concessions to injustice, to put it very radically, therefore[6]

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[i] Strauss comments on a student's paper, read at the beginning of the session. The reading was not recorded.

[ii] "Manchester economics" or "Manchester liberalism" denotes a free-market school of thought, associated originally with Manchester, England in the nineteenth century.

[iii] Perhaps Henry Stuart Hazlitt (1894-1993).

[iv] Senator Barry Goldwater was the Republican candidate for president in 1964. His campaign was one of the first to confront the significant divide between what was subsequently called the "economic conservative" and "social conservative" strains of the Republican party.

[is acceptable to] evils which cannot be disposed of simply? This is a long question and one has to go into it.

Student: In response to prescription, I would only suggest that of[7] Aristotelian prudence, and perhaps that the liberal would say that it isn't coming right away, that it has been at least a hundred years—

LS: There is a very long story and one would have to go into many details, and therefore I think we would all agree that there are honest people in both camps. The question is only: Which is the wiser?

[LS turns to another student paper]

You certainly gave a good impression of how Grotius strikes one, hemming and hawing, no clear line. He is not a man of the people, nor is he an absolutist like [inaudible].[v] He is religious, but not too religious. Well, he is a lawyer, as you wisely pointed out. He is concerned with law as distinguished from politics, and the whole work is a legal work. This creates a difficulty for both of us—I am one of them—who don't have a legal training. One would have to know also Roman law and Canon law, and even traditional Jewish law, to appreciate every little point which he makes. You also saw, however, that there is[8] [another] difficulty which is not directly connected with the legalism, and that is that he exercises a certain kind of prudence, [hemming and hawing about] these things which seem to call for a clear decision. That was a good reason apart from the intrinsic difficulty of trying to beat around the bush.

Still, it is a legal work but in a much broader sense than the word would be used today. You must have seen from his own footnotes, or at least it will come out later if it does not become clear by that time, the great use he makes of Thomas Aquinas, either directly or as a commentary. Of course, chiefly, not exclusively—I have no statistics—[in] the section on justice in the narrower sense.

Of course his use of authority is quite striking, and it was felt to be annoying one generation after, when people came under the influence of Descartes and Hobbes and felt that this is only a display of learning. [The feeling then was that] these are a kind of precedents which are no precedents, precisely because of the selective use made of them. Still, I would say for the time being that the work does have a unity, although the unity is not quite obvious.

There was one point, before we turn to what we were going to discuss today, where I may have misled you, and this referred to a passage in the second chapter in the first paragraph, number 3, page 52.

Reader:

> According to the diversity of the matter, that which we call moral goodness at times consists of a point, so to speak, so that if you depart

[v] Quite possibly Hobbes.

> from it even the least possible distance, you turn aside in the direction of wrong-doing; at times it has a wider range, so that an act may be praiseworthy if performed, yet if it be omitted altogether or performed in some other way no blame would attach, the distinction being generally without an intermediate stage, like the transition from being to not being. Between things opposed in a different way, however, as white and black, a mean may be found either by effecting the combination of the two, or by finding an intermediate between them.
>
> It is with this latter class of actions that both divine and human laws are wont to concern themselves, in order that those acts which were in themselves merely praiseworthy might become also obligatory.[vi]

LS: Let us stop here. So in other words, human laws may coerce with a view to the morals beyond right in the strict sense of the term. What he translates morally good, which is a defense of the translation, the Latin word is *honestum*, and this is used as a translation for the Greek[9] [*kalon*]. In this respect, Grotius still agrees with Aristotle that the human law is also concerned not only with the rights narrowly understood, but also with the noble. This must be exercised.

Now let us turn then right away to the beginning of chapter 3, and read the beginning.

Reader:

> *Division of war into public and private*
>
> The first and most essential division of war is[vii] that into public war, private war, and mixed war.
>
> A public war is that which is waged by him who has lawful authority to wage it; a private war, that which is waged by one who has not the lawful authority; and a mixed war is that which is on one side public, and the other side private.[viii] Let us deal first with private war, as the more ancient.
>
> That private wars in some cases may be waged lawfully, as far as the law of nature is concerned, is, I think, sufficiently clear from what was said above, when we showed that the use of force to ward off injury is not in conflict with the law of nature. For possibly some may think that after public tribunals had been established, private wars were not permissible.[ix] For although public tribunals are the creation not of nature but of man, it is, nevertheless, much more consistent with moral standards, and more conducive to the peace of individuals, that a matter be judicially investigated by one who has no personal interest in it, than that

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[vi] *JBP*, 1.2.1.3.
[vii] This word is repeated in the original transcript.
[viii] In original, not "and the other side private"; "on the other side private."
[ix] "But possibly" begins the sentence in the translation.

> individuals, too often having only their own interests in view, to seek by their own hands to obtain that which they consider right[x]—

LS: Let us stop here. A private war is in the simplest case between individuals. If you are attacked in an alley and shoot it out with your assailant, that is a private war. It can of course be just one side surely, namely, on the side of him who is assailed. But this was not the main point I wanted to make.

Grotius distinguishes here between two forms of natural right, one [of] which precedes any human act. This is, for example, the right of self-defense: this you have by nature, without having done [anything about] it. And then there is also a right of nature which either presupposes or at least demands a special human action. For example, when he says here that[10] [the creation of] public courts, which are of course established by human beings, is demanded by equity and natural reason, he means that is also a natural right prescription to establish such public courts, but this has a different status than the natural right in the primary sense.

He speaks first of private law, which precedes and is older than public law, and in this he implies something like a state of nature, a state antedating civil society. Grotius doesn't speak of [a] state of nature. This seemingly merely[11] [terminological] difference is fraught with great substantive consequences. For the time being we only know that he doesn't speak here about the state of nature. So private law comes first, and he proves in paragraphs two and three that private law is permitted in the New Testament. It goes without saying that it is permitted by natural reason. In a way he repeats here what he had said in the second chapter.

Did you find some subtle differences between the two treatments—between the treatment of private war in chapter 3, and the treatment of war from the Christian point of view in chapter 2?

Student: I was just talking about the point he argued here.

LS: It would be interesting to make a thorough comparison of the two passages. I have not done that.

One point I mention, and I do not know if it is in any way original with Grotius, in paragraph 3, seventh section.[xi] He discusses the case of Peter, and the prohibition against Peter's using the sword. He was rebuked not for his desire of self-defense but for his desire for revenge, Peter being a spirited man. I mention this in passing.

Student: At the end of paragraph 2 or section 2, whatever it is—

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[x] In original, not "to seek by their own hands"; "should seek by their own hands. The passage continues, "wherefore equity and reason given to us by nature declare that so praiseworthy an institution should have the fullest support." Strauss seems to be alluding to this in some of the following discussion. *JBP*, 1.3.1.1-2.

[xi] *JBP*, 1.3.3.7.

LS: Let us make it clear so there are no difficulties. Let us call the first subdivisions of the chapters, paragraphs, and the others, sections.

Student: At the very end of paragraph 2, he says that such a manifest agreement—and he mentioned the Athenian law and the Old Testament law—confirms natural law. At the beginning of paragraph 3, he says however the New Testament might provide a problem.[xii]

LS: Why not? Is it not easily[12] [intelligible]? May not a higher law put restrictions on the freedom given by a lower law?

Student: But what I wonder about: Is there any place in here where he actually says that this happens? In chapter 2 he says he wouldn't deny that the New Testament might make a problem, and he says indeed it has in regard to things like adultery.

LS: Surely, and marriage.

Student: But when he gets into practical questions, he always says, well this could be, but—

LS: I think he discusses it quite clearly when he comes to these questions of marriage and incest.

Now he discusses then in paragraph 5 the question of whether a subordinate may raise war without formal command by his government.[xiii] It is a discussion[13] [of a different kind] now under way. Should the commander in the field act according to the presumed will of his government, or should he assume that his government wishes that no action be taken without the government having been contacted in advance? I mention only that these questions are not of today.

We must now turn to the central question which comes up in paragraph six and which is of course: What is the fundamental difference between public law and private law?[xiv] There is a difference, of course, in that one is waged by a state and the other is waged not by a state—not necessarily by an individual, it may also be by a band, or two gangs may fight each other.

Now what then is a state? Answer: some body of men who are subject to a common power, the government, here called the *summa potestas*, the highest power. And what is that highest power? The general definition is not very revealing: a moral faculty of governing states, *civitas*. Moral faculty means what we would call right. Moral faculty as distinguished from a physical faculty: someone may have the physical faculty of governing a state without having the moral faculty.

[xii] *JBP*, 1.3.2.2, 1.3.3.1.
[xiii] *JBP*, 1.3.5.
[xiv] *JBP*, 1.3.6.

This definition is very general. Grotius follows here simply Aristotle by enumerating the parts of the government as Aristotle has done in various sections of his *Politics*. I thought we should continue and contrast this with Locke, *Civil Government*, at the end of chapter 1. "Political power," which is the same as what Grotius calls *summa potestas*, "I take to be a right of making laws, with penalties of death and consequently of less penalties for the regulating and preserving of property, and employing the force of the community in the execution of such laws and in the defense of the commonwealth from foreign injury, and all these only for the public good."[xv] That of course is a very different definition from that which Grotius gives, or quotes rather, by referring to Aristotle. The difficulty of what this means will become clear from the sequel.

In the next paragraph, seven, he makes a distinction which is very important, namely, the *summa potestas*, the highest power, must have a base.[xvi] Powers do not evolve in the air. They must be in some men or body of men. The basis is called the[14] [subject], that which[15] [underlies]. Now here Grotius makes a distinction between the common subject and the proper subject. That is a very simple distinction: sight. The property of seeing is also a faculty. The common subject, or the common substratum, is of course the human body or the animal body, but the proper subject peculiar to seeing is the eye, because the eye is that in which sight is somehow[16] [located].[xvii]

Now similarly, the common substratum of the highest power is the *civitas*, what we translate by state, but one must never forget that the original meaning is much more republican, and the state is not in itself a republican term. It means the citizen body—the people, you would say. But the proper subject—and in other words if there is no citizen body, no people, there cannot be a[17] [highest] power, but the power is not necessarily located in the citizen body as such. It is located either in one person or in many; the many may be all, theoretically. So there is a technical implication here in the use of the word person. The *civitas*, civil society, is not a person. A person is always a human being. The doctrine that the state is a person was elaborated by Hobbes, and that had very big implications. There is nothing of this kind in this crucial passage in Grotius.

Now in the next paragraph Grotius refutes the doctrine, then very powerful although by no means uncontested, of the sovereignty of the people, i.e., by nature the highest power resides in the people.[18] We must see how[19] [this doctrine] looks to contemporaries who opposed it. Salmasius, a[20] [French author] who defended[21] the case of Charles I[22] [against the revolutionaries], traces the doctrine to the fanatics or enthusiasts.[xviii] Fanatic didn't mean at that time what it means today. The fanatics were those who were concerned with the spirit of the Scripture rather than with the letter. Enthusiasm also has of course a negative meaning: those who rely too much on the lights within them. Filmer, the other

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[xv] Strauss is quoting Locke, *Second Treatise of Government*, chap. 1, § 3.
[xvi] *JBP*, 1.3.7.
[xvii] The passage being discussed here is 1.3.7.1.
[xviii] Claudius Salmasius (1588-1653) wrote a defense of the reign of Charles I of England, *Defensio regia pro Carolo I*, after the king's death at the hands of revolutionaries.

great defender of the monarchy at that time, traced it also to these people and to the Papists. In other words, these were not the ordinary Protestants. Grotius sides with them.

Now according to this then-extreme doctrine, no king or nobility ruled in their own right or by divine right. A king may rule and may rule alone or nobility may rule, but this rule would always have to be transferred[23] [by] delegation[24] [from] the people. Grotius rejects this, and gives many examples of[25] [states] in which there was no recognition whatever of the sovereignty of the people. But this kind of argument was dutifully presented by Rousseau in[26] [*Social*] *Contract*, Book 1, chapter 2.

Grotius denies that all human power is established in favor of those who are governed. He cites slavery as an example, which is obviously not established in favor of the slaves. His most constant manner of reasoning is always to establish what is right by fact. One could use a more consistent method, namely, the facts contradict each other, but none which is more favorable to tyrants, because on the basis[27] [of] right, you cannot make any basis for tyrants very respectable. I think this is a very strong and to some extent justified statement, against Grotius.[xix]

Let us read the beginning of paragraph eight.

Reader:

The opinion that sovereignty always has regard for the people is rejected[xx]

> At this point first of all the opinion of those must be rejected who hold that everywhere and without exception sovereignty resides in the people, so that it is permissible for the people to restrain and punish kings whenever they make a bad use of their power. How many evils this opinion has given rise to, and can even now give rise to, if it sinks deep into men's minds, no wise person fails to see.[xxi]

LS: In other words, disorder, turbulence, anarchy is the consequence of this doctrine if it is not judiciously handled. In the same paragraph he develops the view that the people may choose any form of government they like, *i.e.*, they may even completely alienate the original right if they want, and then it is alienated for good. This does not mean that all government is derived from the people. In other words, he does not try to base the right to rule the people[28] [on] conquest. He does not try to trace it to a contract. That is of course what Hobbes did: all right of government is derivative from a contract, and therefore even the right of master over slave is based on a contract. That is not yet done, as far as I can see, by Grotius. The right to rule may be acquired by a just war, but here I think the implication of Grotius at any rate is the subjection which takes place, that the conquered recognize the conqueror, is not then strictly speaking a promise of contract, or if it is,[29] [their right is completely relinquished]. This is not clear yet.

[xix] Strauss has here paraphrased a passage in Rousseau's *Social Contract*, Bk. 1, chap. 2.

[xx] In the translation this paragraph heading reads "*The opinion that sovereignty always resides in the people is rejected, and arguments are answered*".

[xxi] *JBP*, 1.3.8.1.

Student: Later on when he talks about a usurper, he says that the right of resistance remains unless somehow the people have accepted.

LS: Yes, but if it was a just war. Needless to say, these are all extremely topical subjects. Think of Goa and Angola[xxii] and all these places. From Grotius' point of view it would be absolutely impossible for these dependent nations to become independent, and however politically bad this may be from our point of view, nevertheless it is not quite as simple. In other words, these people have been subject to a foreign power for 500 years: this does not mean that this is now settled forever. I believe all of this ought to be admitted today.

Student: When he talks about usurpation, he talks about it [as] if it is still fresh . . . .

LS: Surely, but say 500 years—then it is no longer fresh.

Student: That is what I mean. Grotius would say that they had possession.

LS: In other words, the right of the Portuguese to rule Angola is absolutely unquestionable.

Student: Yes.

LS: Or Goa, for that matter. Gronovius, the commentator whom I use and who is also a Protestant, denies, against Grotius, that in Germany, France, Spain, for example, there is a government which is not ultimately due to delegation from the people. These European governments are ultimately based on delegation of the people. And he also denies that the right of resisting and punishing tyrants ever ceases. In other words, here Grotius takes the position very favorable to absolute government much more than quite a few of his contemporaries did.

We might read the beginning of section 13 of this paragraph.

Reader: [30]

> The arguments which are presented on the other side it is not hard to meet. For, in the first place, that the assertion,[xxiii] that he who vests someone with authority is superior to him upon whom the authority is conferred, holds true only of a relationship effective which is continually dependent on the will of the constituent authority.[xxiv] It does not hold true for the situation brought about by an act of will, from which a compulsory

[xxii] Goa is a state in India formerly held by Portugal and militarily taken by India in 1961. Angola, a Portuguese colony, was the site of an armed struggle for independence beginning in 1961. It finally became independent in 1975.
[xxiii] In original, not "that the assertion"; "the assertion."
[xxiv] In original, not "a relationship effective which"; "a relationship the effect of which."

> relationship results, and indicates that a woman giving authority over herself to her husband[xxv]—

LS: In other words, she cannot revoke it at her pleasure. Similarly a subject nation: whether it is of the same country [inaudible] or not doesn't make any difference.

Read also the beginning of section 14.

Reader:

> Another argument men take from the saying of the philosophers, that all government was established for the benefit of those who were governed, not of those who govern it;[xxvi] from this they think it follows that, in view of the worthiness of the end, they who are governed are superior to him who governs.[xxvii]

LS: Also denied by Grotius. I mean these key arguments for a republic or a democracy are denied.

Now he turns then in the sequel to the practical question. Since we know that a public war can only be a war which is waged by him or those who have the supreme power, it is sometimes difficult to find out who has the supreme power in a given society. Titles do not settle it; in other words, if a man may be called king, has the title king, and be simply a republican magistrate. Nor would hereditary succession settle the issue. One must consider also not only who possesses the supreme power in a general way but also the various modes of possessing it, and here there comes this strange sentence in paragraph 11, section 2, that dictators or executors of a minor prince possess the supreme power.[xxviii] In other words, the dictator will hold the power for six months[31] [and for] six months [has] complete power.[32] For this period he has the supreme power, and this naturally contradicts the general doctrine of sovereignty. I do not know whether anyone else has ever maintained[33] [this]. The dictator, being appointed by the Roman people, is of course not the possessor of supreme power, but can exercise the full power of the Roman republic, not even the full power, but much of it, during his stay in office.

His discussion of this doctrine of the sovereignty of the people is taken up again in paragraph 12, where he takes issue with[34] [certain "learned men"].[35] [These were] called in the sixteenth century the tyrant-slayers.[36] [There were] both Calvinists and Catholics who belonged to that school, who said that a tyrant as tyrant may be slain.[xxix] This requires all kinds of distinctions, because there are two kinds of tyrants, a tyrant from

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[xxv] In the translation, the selection ends: "from which a compulsory relationship results, as in the case of a woman giving authority over herself to a husband, whom she must ever after obey." *JBP*, 1.3.8.13.

[xxvi] In original, not "those who govern it"; "those who govern."

[xxvii] *JBP*, 1.3.8.14.

[xxviii] The "dictator" referred to here is the temporary office of dictator under the ancient Roman republic.

[xxix] These "learned men" are not named by Grotius. *JBP*, 1.3.12.1.

defect of[37] [title], *i.e.*, a usurper who might otherwise be a very fair man, or a tyrant, a legitimate king but who rules unjustly. That was called [38] [*tyrannus in regimine*], "tyrant from the exercise of his power."[xxx] Not all decided equally the two kinds of cases, but simply stated, there was a school which said a tyrant can be slain. Grotius of course is very skeptical. Hotman[xxxi] had said no, people can belong to a king so that he can do with it what he likes. Grotius says there are people which lack civil liberty while having personal liberty. In other words, they are not slaves or servants; they own their property, but they have no political right. Civil liberty means here political right as distinguished from personal right. He speaks then of the case of people who voluntarily gave[39] their power to the king, *i.e.*, not compelled by duress. This, in Grotius' view, is the case of the Germanic nation.

Let us look at the beginning of paragraph 15.

Reader:

> Another proof of this distinction appears in the method of safeguarding royal power, when the king is prevented by age or by disease from performing his functions.
>
> In the case of monarchies which are not patrimonial, the regency passes into the hands of those whom it is entrusted by public law,[xxxii] or, that failing, of the consent of the people.[xxxiii]

LS: This is only another index or sign of whether the highest power is possessed fully, as it would be possessed in a patrimonial kingdom, or not fully. The case discussed here is of course where it is not fully possessed. The highest power is not given up by virtue of promises made prior to the reign, say the young prince makes certain promises—this is not binding on him. Let us read perhaps paragraph 16, section 4.

Reader:

> What should be added to the condition that if the king should violate his pledge he would lose his kingship?[xxxiv] Even under such circumstances the power of the king would not be supreme,[xxxv] but the mode of possessing it will be restricted by the condition, and it will resemble the sovereign power limited in time. As the king of the Sabaeans Agatharchides related

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[xxx] The other type of tyrant was *tyrannus in titula*. There is a brief account of this, citing some of the Catholic and Protestant authors involved, in the *The Catholic Encyclopedia* (1907-14; New Advent, 2012), s.v. "tyrannicide," http://www.newadvent.org/cathen/15108a.htm.

[xxxi] François Hotman, *Francogallia, or an Account of the Ancient Free State of France* (1574), trans. Robert Molesworth, in Robert Molesworth, *An Account of Denmark, with Francogallia and Some Considerations for the Promoting of Agriculture and Employing the Poor*, ed. Justin Champion (Indianapolis: Liberty Fund, 2011).

[xxxii] In original, not "of those whom it is entrusted"; "of those to whom it is entrusted."

[xxxiii] In original, not "of the consent of the people"; "by the consent of the people." *JBP*, 1.3.15.1.

[xxxiv] "What if there should be added the condition" begins the passage in the translation.

[xxxv] In original, not "the power of the king would not be supreme"; "the power of the king will not cease to be supreme."

> that he was "accountable to no one,"[xxxvi] being possessed of the most absolute power, but that if he should go outside his palace, he could be stoned. This fact was noted also by Strabo, on the authority of Artemidorus.[xxxvii]

LS: So you see Grotius does make some qualification in favor of public liberty under certain conditions. He discusses another aspect of the question of supreme power in paragraph seventeen, and he uses here a distinction between two kinds of[40] [sovereignty]. Let us read the beginning.

Reader:

> In the fourth place it is to be observed that while sovereignty is a unity, in itself indivisible, consisting of the parts which we have enumerated above, and including the highest degree of authority, which is "not accountable to any one"; nevertheless a division is sometimes made into parts designated as "potential" and "subjective."[xxxviii]

LS: This distinction is made in much greater detail in Thomas' *Summa, secunda secundae*, question 48. I limit myself only to that part needed for understanding the passage in Grotius. The highest power can be divided, but in two different ways: according to subjective parts (subjective means here always the substratum, the sub-stratum can be divided), for example, the Roman Empire, the Eastern Roman Empire and the Western Roman Empire; and yet nevertheless the whole remains the Roman Empire, of course, they are not simply separate states. Now as for the potential parts of the highest power, if the people reserve part of the supreme power for themselves and entrust the other part to a king, now why is this the potential part? Because none of the two parts possesses the supreme power in full, only in potency.

There is a remarkable paragraph in paragraph 20.

Reader:

> More important is the generalization of Aristotle,[xxxix] who wrote that there are certain types of monarchy intermediate between the full royal power, which he calls absolute monarchy, and (this is the same as the "complete monarchy" in the *Antigone* of Sophocles;[xl] it is called by Plutarch "monarchy governing in its own right and not accountable to any one," and by Strabo "authority absolute in itself,") and the kingship of the Lacedaemonians,[xli] which is merely a government by beating men.[xlii]

[xxxvi] "Sabaeans" and "Agatharchides" are marked inaudible in the original transcript.
[xxxvii] "Strabo, on the authority of Artemidorus" is marked inaudible in the original transcript. *JBP*, 1.3.16.4.
[xxxviii] In Latin the terms are *partes potentiales* and *partes subjectivas* respectively. *JBP*, 1.3.17.1.
[xxxix] In original, not "important"; "in point" in the translation.
[xl] In original, not "and this is the same as"; "this is the same as."
[xli] "Strabo" and "Lacedaemonians" are marked inaudible in the original transcript.
[xlii] In original, not "by beating men"; "by leading men."

> In my opinion, an example of division of sovereign power can be found in the case of the Jewish kings. In respect to most matters, these kings ruled with sovereign power, is, I think, beyond cavil.[xliii]

LS: Not of this division, but of this thing, kingship. Let us see from the context what he means by that.

Reader:

> The people had in fact wished to have a king such as the neighboring peoples had; but oriental peoples were ruled in a very arbitrary way.[xliv]

LS: Let us read the beginning of the next section.

Reader: [xlv]

> The entire Jewish people, of whom we remarked above also, was under the king; and Samuel, setting forth the right of kings, and making plain enough that the people have no recourse against acts of injustice on the part of the king. This conclusion coincides with the interpretation that the early commentators rightly gave to the words of the song: "against thee only have I sinned."

LS: Against God only. In this passage—the whole paragraph describing everything—what Grotius says[41] is that absolute kingship is at home in the Orient, whereas the Western nations, the Germanic nations (called Germanic because of their German origin), they do not have this Oriental despotism. This is a point of some importance. Machiavelli in his *Discourses* makes a similar suggestion[xlvi] and it may have been made by other people before, and this applies to the Jews in particular. [That] the Jewish kingship[42] [was] absolute kingship was naturally contested. The most famous man who contested this interpretation was naturally John Milton. The thing is quite complicated.[43] [There is a] passage in 1 Samuel, chapter 8, where Samuel tells the people of Israel what the king will do. He will take away their sons and their daughters, and he will impose an arbitrary tax and so on and so on. This was the question: Is this a prophecy, a warning, or does this formulate the right of the king? The traditional Jewish interpretation was that [it] is the right of the king, and this was of course very agreeable to the absolutist people, whereas the more liberal people today say it was only a warning, what the king would in all likelihood do. But it was a long question.

[xliii] "That in respect to most matters" begins this sentence in the translation. The words "beyond cavil" are marked inaudible in the original transcript.

[xliv] *JBP*, 1.3.20.1.

[xlv] The original transcript contains a number of deviations from the translation of this selection. Kelsey translates the passage so: "The entire Jewish people, as we remarked above also, was under a king; and Samuel, setting forth the rights of kings, makes it plain enough that the people had no recourse against acts of injustice on the part of the king. This conclusion coincides with the interpretation that the early commentators gave to the words of the Psalm: 'against thee only have I sinned.'" *JBP*, 1.3.20.2.

[xlvi] Possibly referring to *Discourses*, Bk. 2, chap. 19.

Now one more point regarding this chapter. He speaks then in the sequel of how this supreme power of the government is affected by the existence of an alliance. The allied states are of course still sovereign states, but there are certain qualifications and certain things they may or may not do. In this connection, he mentions especially in paragraph eight that hegemonic[44] power, as Athens was in the Maritime Alliance, that is of course not empire.[xlvii] Empire means the right to command, which I think[45] [Athens] originally did not possess.

Let us read in paragraph 21, the end of section 10.

Reader:

> In Livy, too, Eumenes says that the allies of the Rhodians are allies in name only being in reality subjects of the rule of another and accountable to it.[xlviii] The Magnesians also declared that Demetrias, though independent according to appearances, was in reality at the beck and call of the Romans.[xlix]

LS: In other words,[46] [the fate of] of the satellites today.[l] Are they from a serious point of view independent states or not?

Reader:

> Next Polybius observes that the people of Thessaly were in appearance independent, but in reality under the rule of the Macedonians.[li]
>
> When such things happen, with the result that non-resistance on the part of the weaker passes over into the right of ruling on the part of the stronger—there will be opportunity to take up this point elsewhere—that either those who have been allies become subjects, or there is at any rate a division of sovereignty such as, according to our previous statement, can take place.[lii]

LS: Patience, sufferance, acceptance goes over into right. There is no given moment, there is no legal act, in which these people abandon their sovereignty, but by acting all the time as satellites, then they cease to be sovereign even in law. Now what is the justification for this? That long-suffering of such rule gives the ruler a title to rule?

Student: These people are in some way natural slaves.

[xlvii] *JBP*, 1.3.21.8.
[xlviii] "In Livy, too, Eumenes" and "Rhodians" are marked inaudible words in the original transcript.
[xlix] "Magnesians" is marked inaudible in the original transcript. *JBP*, 1.3.21.10.
[l] Presumably the "satellite" states of the Soviet Union, in Eastern Europe.
[li] "Next" (not thus) begins the passage in the translation. Not "the Macedonians"; "Macedonia."
[lii] *JBP*, 1.3.21.10-11.

LS: I believe that is not the way in which Grotius would answer, because the alternative is constant anarchy, constant disturbances. There must be an end to recognition of[47] [a right to resist]. This, I believe, we will find later on. Now let us turn to the next chapter; there are quite a few interesting things in[48] [it]. Grotius deals with war in general; and therefore he must also deal with civil war or what we call revolution; after all, these are forms of war. Here, therefore, the question arises: May subjects wage war against the government? The natural right to resist the aggressor is necessarily restricted within civil society, and especially the right to resist the government. In other words, if this man who has[49] [assailed] you is a policeman, it is a different case than if he is not a policeman. This is confirmed by the right of the kings in 1 Samuel 8, as Grotius explains in paragraph 3 of chapter 4.

Reader:

> In Hebraic law he was condemned to death who had been disobedient, either to the high priest or to one that had been appointed by God out of the ordinary way as ruler of the people.
>
> If we examine closely the passage in Samuel which deals with the right of the king, it becomes clear that on the one hand this must not be understood as setting forth a true right, that is, the power to do something in a manner morally right and just (an altogether different manner of life as prescribed by the king in the part of the law which deals with the duty of the king), nor, on the other hand, is a mere fact indicated[liii]—

LS: As Milton and these people said, that the king would in fact take away their sons and daughters.

Reader: [liv]

> for there is nothing in it peculiar to a king, since private persons are also wont to do wrongs to private persons. A fact is set forth, in a manner, which has in a measure a legal effect, that is, the obligation not to offer resistance. So it is added, that the people when oppressed by such wrongs should deplore the health of God, or in fact, there would be no recourse at the hands of man. And that, therefore, is called the legal right in the sense that the preacher is said to "enforce the legal right even when it is an unjust decision."

LS: In other words, in spite of the hemming and the hawing, he comes down on the side of the absolutists, as this key passage is in favor of non-resistance to the king. Now the

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[liii] In original, not "prescribed by the king"; "prescribed for the king."

[liv] Kelsey's translation differs from the original transcript in several instances: "for there is nothing in it peculiar to a king, since private persons are also wont to do wrong to private persons. A fact is set forth, however, which has in a measure a legal effect, that is, the obligation not to offer resistance. So it is added, that the people when oppressed by such wrongs should implore the help of God, because, in fact, there would be no recourse at the hands of man. That, therefore, is called a legal right in the sense that the praetor is said to 'enforce the legal right even when it is an unjust decision.'" *JBP*, 1.4.3.

conclusion is obvious. If even the Old Testament, which is much less severe, forbids resistance to the king, the New Testament, which demands a much higher degree of patience, forbids it still more. That is the argument here.

Now what is the heading of paragraph 4?

Reader: "*That rebellion is even less allowable according to the law of the Gospel*"[lv]—

LS: So in other words,[50] [the Gospel] is much less[51] [tolerant of resistance] than the Old Testament. Now what is the point? What is the basis of this severe prohibition? Let us read[52] [section] 3—omit the quotations.

Reader:

> If sometimes under the influence of excessive fear or anger or other passions, rulers are turned aside so that they do not enter this great road that leads to tranquility,[lvi] this must be reckoned among the things that less frequently happen;[lvii] and such things, as Tacitus remarks, are offset by the interposition of better things . . . .[lviii]
>
> Things which happen rather infrequently ought nevertheless to be brought together under general rules, for although the principle embodied—

[change of tape]

LS: Now if we try to understand that, there[53] [are] in these paragraphs here no Christian authors quoted as far as I can see. There are many authors quoted, but there are no Christian ones. The consideration is this: The general argument on the basis of natural reason is in favor of unqualified obedience to the law on the basis of the primacy of the common good. The damages or disgraces which you as an individual or a group suffer are not comparable to the misery of anarchy.

Now let us see at the beginning of section 6 of this same paragraph.

Reader: "With Paul let us associate Peter as a companion."

LS: Now previous to this—this shows you that Grotius is not averse to using certain minor tricks. In paragraph 2 he had spoken of Paul, and then now he brings in Peter. In between, so to speak, we have a purely pagan, *i.e*., non-Christian or non-Jewish doctrine.

[lv] *"That rebellion is even less allowable according to the law of the Gospel; proof is presented from Holy Writ"* is the complete title of this paragraph heading. *JBP*, 1.4.4.

[lvi] In original, not "enter this great road"; "enter the straight road."

[lvii] In original, not "this must be reckoned"; "this after all must be reckoned."

[lviii] The omitted quotations are these: "Laws, again, count it sufficient to have in view what generally happens, as Theophrastus remarked. A saying of Cato bears on the same point: 'There is no law which is sufficiently well adapted to all cases; this only is aimed at, that a law be serviceable to the majority, and of general application.'"

He wants to indicate that there is a difference between the Christian reasoning regarding non-resistance and the natural reasoning.

Reader: "Peter's words are 'honor the king.' Servants be in subjection to your masters with all fear, not only to the good and gentle, but also to the froward. For this is accessible,[lix] if for conscious toward God and man enduring priests[lx]—"

LS: In brief, what I believe he conveys here is this. The Christian reasoning for patience and absolute law-abidingness is not so much [for] the common good as specifically religious considerations. We will come to some confirmations later on. For the time being I note only this remarkable fact, which induces me to think that there is more in Grotius than meets the eye at first reading. Here you have this strange thing—as I say, in paragraph 2 Paul, paragraphs 3[54] [through] 5 only pagan authors, and then suddenly, surprisingly, he brings the testimony of Peter. And this is the question: Is the Christian[55] or New Testament teaching identical to that given by the historians, philosophers, and so on of antiquity? Grotius was surely aware of this question.

Then he shows in the sequel, in paragraph 5, that the Christian practice is in agreement with the New Testament teaching, *i.e.*, non-resistance. But he gives only examples of Christians under the pagan empires, not under Christian empires, which affects of course the question. After all, a Christian emperor is obliged to obey the Christian law. Now how could he justify that? We must never forget he is a Protestant. The primitive church, the early church, the wholly uncorrupted church[56]—[that is where] we have to go in order to find the rule of right, an argument very convincing from a Protestant point of view.

Now he goes on in paragraph 6 to say that some Christians of the present age do permit resistance, not[57] [by] private[58] [individuals], because that is absolutely shocking, but[59] [by] inferior[60] [officials].[lxi] [Inaudible] famous work of the sixteenth century. In other words, the states of the[61] [nation], duly assembled, may act against a tyrannical king.[lxii] This is orderly and proper, but an individual who just shoots down the tyrant, that is disorderly. Now Grotius rejects this view.[62] Inferior magistrates are, compared with the highest power, also private citizens. In other words, he also takes here the more absolutist view. Let us read in paragraph 6, the fourth section.

Reader:

[lix] In original, not "accessible"; "acceptable."

[lx] The quotation as presented in the translation reads: "if for conscience toward God a man endureth griefs, suffering wrongfully. For what glory is it, if, when ye sin, and are buffeted for it, we shall take it patiently? But if, when ye do well and suffer for it, ye shall take it patiently, this is acceptable with God." *JBP*, 1.4.4.6.

[lxi] At this point Grotius cites *On Judges* by Peter Martyr (1499-1562), *On Romans* by David Pareus (1548-1622), and *Politici* by Lambert Daneau (c. 1530-1595).

[lxii] Strauss may have in mind bodies such as the French Estates-General; he does not seem to be referring to anything in the relevant passage of Grotius (1.6.6).

> And so among the Jews the condition of public worship also always depended upon the will of the king.[lxiii] Since after the king the public officials at the same time with the people promised that they would be faithful to God, this must be understood to mean, so far as it would be in the power of each. We have never read that even the images of false gods, which were standing in public places, were ever thrown down except by order of the people, when the state was a free republic, or by that of the kings when kings were in power. If sometimes violence was used against kings, the fact is reported as evidence of the interposition of divine providence which permitted the deed, not as a mark of[lxiv]—

LS: In other words, the duty to obey extends even to the toleration of idolatry. If idolatry is permitted by the government, whatever the government may be, then the individual has no right to act privately, and the case of the prophets in the Old Testament is quite interesting, but here he has a good way out, where they have this special privilege.

Paragraph 7 is a particularly interesting paragraph. Is resistance not permitted under any circumstances? Let us see the general rule which he establishes in paragraph 7, section 2.

Reader: "I do not deny that even according to human law certain acts of the moral nature can be ordered which expose one to the sure danger of death. An example is the order not to leave one's post[lxv]—"

LS: During war, in the army.

Reader:[lxvi]

> to assume that such was the purpose of him who laid down the law; and it is apparent that men would not have received so drastic a law applying to themselves and others except that as constrained by an extreme necessity.[lxvii] For laws are formulated by men, and ought to be formulated with an appreciation of human frailty.

LS: In other words, that the poor fellow had done so much marching today that he could not help falling asleep would not be valid because of the extreme absurdity. Too much depends on his being awake.

Reader:

> Now this law which we are discussing—the law of non-resistance—seems to draw its validity [63][from] the will of those who associate themselves

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[lxiii] In original, not "the will of the king"; "the will of the king and the sanhedrin."
[lxiv] Kelsey ends his translation of this passage with the words "not as a mark of approval of the action in the sight of men." *JBP*, 1.4.6.4.
[lxv] In original, not "acts of the moral nature"; "acts of a moral nature."
[lxvi] In the translation the first sentence is worded "We are not, however, rashly to assume that such was the purpose of him who laid down the law."
[lxvii] In original, not "except that as constrained"; "except as constrained."

> together in the first place [64][to form a] civil society.[lxviii] From the same source, furthermore, derives the right which passes into the hands of those who govern. If these men [65][could] be asked whether they [66][purposed] to impose[lxix] on all persons the obligation to prefer death rather than [under] any circumstances to take up arms in order to ward off the violence of those having superior authority,[lxx] I do not know whether they would answer in the affirmative, unless, perhaps with this qualification, in case a resistance could not be made without a very great disturbance in the state, and without the destruction of a great many innocent people. I do not doubt that [67][to] human law also there can be applied what love under those circumstances would permit.[lxxi]

LS: In other words, after much hemming and hawing, in the extreme situation of a dastardly tyranny, resistance will be permitted. The rigid prohibition against resistance stems not from natural law, as we have seen, but from human law.

He discusses then in sections 4 through 6 of this same paragraph the case of David versus Saul, and the Maccabees versus Antiochus, the Syrian king. Here David refused to lay his hand on Saul, although he could easily have done so. These cases of resistance were perfectly decent and in no way contradict, according to Grotius, the entire resistance doctrine. This whole argument leads up to section 8 of this paragraph which we should read.

Reader:

> It is a more difficult question to determine whether, in this manner,[lxxii] as much is permitted to Christians as was permitted to David or to the Maccabees;[lxxiii] for the Master of the Christians, on so many occasions bidding them to bear the cross, seems to exact a greater degree of long-suffering.

LS: Patience.

Reader:

> Surely when the higher powers threaten death to Christians on account of their religion, Christ concedes to them the right to flee—to those, at any rate, whom the necessary discharge of duty does not bind to a particular place. Beyond the right to flee, he makes no concession. Peter, in fact, says that in suffering Christ left to us an example that we should follow;

[lxviii] Kelsey has "validity from the will of those who associate themselves together in the first place to form a civil society."
[lxix] In original, not "should be asked whether they propose to impose"; "could be asked whether they purposed to impose."
[lxx] In original, not "rather than any circumstances"; "rather than under any circumstances."
[lxxi] In original, not "that the human law"; "that to human law." *JBP*, 1.4.7.2.
[lxxii] In original, not "manner"; "matter."
[lxxiii] In original, not "as much is permitted to Christians"; "as much is permitted also to Christians."

> though he was free from sin, and not vile,[lxxiv] "when he was reviled, he reviled not again; when he suffered, threatened not, but committed himself to Him that judgeth righteously." He says also that Christians ought to return thanks to God and rejoice, if as Christians they suffer punishment. We read that the Christian religion waxed strong by reason of such long-suffering.[lxxv]

LS: In other words, whatever may be true of natural right or under the oldest law, surely Christians must prefer death to resistance as the ancient Christians did, not the rebellious Christians of the sixteenth century, and here he says the ancient Christians did suffer, not merely because they lacked power, which would be a very low reason. He makes this point later also regarding the Jews, in section 12. Section 14 we should read.

Reader:

> Valens impiously and cruelly raged against those who, in accordance with the Holy Scriptures and the tradition of the Fathers, professed the "homoousian" doctrine. Although the number of believers was very great, they never defended themselves[lxxvi]—

LS: In the contradiction between[68] [Valens] and the[69] [homoousians], the[70] [homoousians] meaning Christian[71] [trinitarians], this is a powerful case.[lxxvii] Christians have no right to rebel on religious grounds, and this is the culminating statement which we just read. The old commentator, Gronovius, makes this very interesting point: Christians may not fight their rulers on grounds of religion. This amounts to a condemnation of the heroes who did just that in the Low Countries, Germany, and France. He is thinking of course of the Protestants and[72] [those] to whose arms we, the Protestants, owe the freedom of conscience. You can see the hemming and hawing has a point,[73] Grotius being himself a Protestant. If one may resist, as Grotius admits, in order to defend life and limb against the tyrant, why not in order to defend a much greater good, namely, the true religion? This is a strong point, but Grotius surely takes this low view. This is of course a foreshadowing of Hobbes: if your life is in danger, then you may act, but not otherwise.

Gronovius refers to John Milton's argument that the ancient Christians did not resist because they had no power, but this was due also to their complete indifference to things of this world, since they expected the last day [was] coming. The early, ancient Christians did not resist not because they could not resist. Nor would they wish to resist if they could, not because they had regarded resistance as forbidden, but because of too great an ambition for material goods. Milton is also not a very orthodox man.

Do you see what the problem is? From a Christian point of view the practice of the ancient church is the model. The ancient church did not resist—I mean did not engage in

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[lxxiv] In original, not "not vile"; "without guile."
[lxxv] *JBP*, 1.4.7.8.
[lxxvi] "Valens" is marked inaudible in the original transcript. *JBP*, 1.4.7.14.
[lxxvii] The "homoousians" believed that all three persons of the Trinity were of one substance.

active resistance. Why did they not do it? That is the question. Now one could simply say that they didn't have the power. Otherwise, of course, one would have to take up arms, but John Milton does not accept this way out. He says—and this is important because Milton is in favor of armed resistance on religious grounds and the reason which he gives is [that] they preferred material goods too much because of a too great ambition for material [things]. Did I make the issue clear?

In section 8 he discusses resistance against princes who are in fact only republican magistrates, which is of course[74] [a special case] because they are subject to the law. Let us read paragraph 11.

Reader: "In the fourth place, says the same Barclay—"

LS: Barclay is that Royalist writer whom Locke still discusses at some length.

Reader:

> the kingdom is forfeited if a king sets out with a truly hostile intent to destroy a whole people.
>
> This I grant, for the will to govern and the will to destroy cannot coexist in the same person. The king, then, who acknowledges that he is the enemy of the whole people, by that very fact renounces his kingdom.[lxxviii] This, it is evident, can hardly occur in the case of the king possessed of his right mind,[lxxix] and ruling over a single people. Of course, if a king rules over several peoples, it can happen that he may wait to have one people destroyed for the sake of another, in order that he may colonize the territory[lxxx]—

LS: Which raises an interesting question what the victims are entitled to do. But he doesn't discuss that here. So in other words, this he admits: if there is a[75] [malicious] rule, and the king wants to destroy the people he rules, then of course something must be done about it. But this is extremely hard to give [rules for], because no one can say that Hitler intended to destroy the German people. There is no evidence of that. It may have been the effect, but surely not the intent.

I would like to have you read one more, in the next chapter, paragraph 2.

Reader: "But in default of all other ties, the common bond of human nature is sufficiently strong. Devoid of interest to man is nothing that pertains to man—"

LS: That is a quotation from Menander,[lxxxi] and then he quotes[76] [Democritus].

[lxxviii] In original, not "he is the enemy"; "he is an enemy."
[lxxix] In original, not "in the case of the king"; "in the case of a king."
[lxxx] Kelsey has "that he may wish to have one people destroyed for the sake of another, in order that he may colonize the territory thus made vacant." *JBP*, 1.4.11.
[lxxxi] The lines just read are in Grotius' main text. Strauss interrupts before the quotation from Menander is read.

Reader:

> Similar is this saying by Themocrites:[lxxxii] 'Those who are oppressed by wrong-doing must be defended to the limit of our strength, and not neglected; for that is a work of justice and goodness.' The thought is best developed by Lactantius:
>
> > 'God, who did not impart wisdom to the other animals, made them more safe from attack and from danger by natural means of defense. But because He made man naked and weak, to the end that He would rather equip him with wisdom,[lxxxiii] in addition to other gifts He gave to man this feeling of youthful regard,[lxxxiv] that man should defend, should love, should protect man, and should both receive and furnish help against all dangers.'[lxxxv]

LS: Lactantius is a Christian author who is certainly taking his view. The question which we would have to raise is this. If one takes Lactantius—the statement which is quoted here is of course not peculiarly Christian—but if we take it as a statement of a Christian, then it would mean this: there is a duty of Christian charity which may lead one to help a people against a tyrant. Now the overall question would then be: Is there a possible contradiction between the prohibition against[77] rebellion and the duties of Christian charity? This question is of course at most alluded to by Grotius, and surely not faced. He likes to leave it at that, at the doctrine of patience.

Student: Would the case really occur, because the person who would have the duty of submission is not the person who would be able to help another against a tyrant?

LS: There are simple cases—you mean King A attacking King B. But then what about the secret ambassadors coming from King B trying to persuade King A to do that? After all, morally speaking they are responsible for the war, the war of liberation which King A starts. I believe the utmost one could say is that Grotius alludes to this difficulty. His official teaching is clearly in favor of what we would say today: the status quo.

I believe there is nothing peculiar in what he says in the last paragraph in chapter 5, that the freedom of the clergy from military service is not universally valid. The clergy can of course be drafted as soldiers in an emergency just as other people who are ordinarily not[78] soldiers. Is there any other broader point which you would like to bring up?

Student: A point I have gotten interested in is when he talks about what the origin of sovereignty is. He certainly does make his point that you can't have sovereignty without the consent of the people, but that seems to be the only way he can say it, the only way he does say it.

[lxxxii] In original, not "Themocrites"; "Democritus."
[lxxxiii] In original, not "that he would rather"; "that he might rather."
[lxxxiv] In original, not "youthful regard"; "mutual regard."
[lxxxv] *JBP*, 1.5.2.2.

LS: You do not find in Grotius a straightforward, explicit natural right account of the genesis of civil society or government. That is somehow buried, not only if you compare that with Hobbes and Locke, but also some of the later scholastics give such an explicit account. In addition, the social contract doctrine had been developed in its classic form in Grotius' lifetime by a man called[79] [Suárez], a Spaniard, if my memory doesn't deceive me.[lxxxvi] You find a good useful presentation of that in the book by Gough, *The Social Contract*.[lxxxvii] One can say the classic form of the doctrine of social contract was developed relatively late, the end of the sixteenth century, but this has an older origin and the ingredients were there before. So Grotius knew that, but for one reason or another—perhaps because he does not entirely agree with the contractual doctrine. There is some basis for that.

Student: He doesn't want to.

LS: Perhaps he was too much of an Aristotelian, one can also say, to accept the contractual doctrine. That is my impression.

Student: Doesn't Grotius speak of the state of nature, but he means it as the state of man living without[80] [revelation].

LS: That was called the state of nature ordinarily in Christianity.[81] But this is of course the state of civil society. All pagans live in a state of nature. There is the Roman Empire, state of nature, Mexico prior to the Spanish conquest, state of nature. But the state of nature should mean what it came to mean,[82] [the way it is] is now used without any thought about it, that it means a state prior to the emergence of any human law or of any human government. That is a very long question how this concept arose. That people talked of such a state, an early state where individuals roamed in forests or what not, this is as old as the hills—but that it was understood as a *natural* state, that's the difficulty. I mean, it took me a long time until I became aware of it because everyone said state of nature everywhere, and when I happened to read in Hobbes's *De cive* that this state, this condition of man, which it may be permitted to call natural, then I suddenly wondered,[83] [at that time it was not] the ordinary usage. Hobbes takes the liberty of calling it that. For example, in Lucretius—this is one of the most well-known sources of such a description of a pre-social and pre-political state of man, of course not called the state of nature,[lxxxviii] although in practically all textbooks and statements on Grotius,[84] [the primitive state] is called the state of nature. That isn't fair precisely because it is so defective, it is not man's natural state. From Lucretius' point of view, man's state of nature is the state of the philosopher, but not this.

The expression occurs prior to Hobbes, and we will find it even in Grotius, and if I can trust the translation of a certain text of [inaudible], it occurs in [inaudible] edition. It

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[lxxxvi] Francisco de Suárez (1548-1617), a Spaniard, entered the Jesuit order at Salamanca. He wrote in the Thomistic tradition but in ways that anticipated (or paved the way for) modern developments.
[lxxxvii] J. W. Gough, *The Social Contract: A Critical Study of its Development* (Oxford, 1936).
[lxxxviii] Lucretius, *On the Nature of Things* 5, ll.925ff.

occurs there, but I would have to read the[85] [precise] original which I have not been able to do. Socinus, a famous theologian, the originator of Unitarian Christianity in the sixteenth century,[86] could be expected for some reason to speak of that.[lxxxix]

Words are not arbitrary, words of any significance, and then suddenly from Hobbes on, everyone speaks all the time of state of nature, so much so that a century later Rousseau can say that all political philosophers have thought it necessary to refer to the state of nature. Where is the state of nature in Plato and Aristotle? The simplest explanation which I can suggest is this; as a first approximation, I think this will do. The orthodox Christian doctrine is this: there is a state of nature and a state of grace. I disregard here the state of law which is in between because it applies only to Jews. The state of nature is either pure nature or corrupt nature. And this is the state of course in which all non-Christians are, the Jews not quite, belonging to the state of law.

And what Hobbes does is this: state of nature, state of civil society. This is, I believe, self-explanatory.

Christian	*Hobbes*
Pure State of Nature	Corrupt State of Nature
State of Grace	State of Civil Society

Hobbes denies the relevance of the distinction between the pure and the corrupt state of nature; therefore, there is no need for grace, but since the state of nature is admittedly imperfect—or to use Locke's beautiful understatement, it has so many "inconveniences"—therefore you need something to remedy these inconveniences, and that is civil society.

This I would say is still the best primary explanation which one can give. There are some complications. After all, a single individual cannot do all these things unless he has the working power of Grotius, who does everything, or some man of this nature. This is what happened and now this raises other very interesting questions. Since this stems originally from Christian theology, where precisely is the state of nature located? Now, [as to] the state of corrupt nature, that is clear: after the fall. But what about the state of pure nature? That is a difficult question, because according to the orthodox Christian doctrine, there was never a state of pure nature because Adam, prior to the fall, had not only a pure nature but also supernatural greatness. This is what Rousseau had in mind in his passage in the *Discourse on the Origin of Inequality,* where he says that a Christian can never admit that there ever was a state of nature, properly speaking.[xc]

[lxxxix] Faustus Socinus (1539-1604) is most famous for maintaining a heterodox view of the Trinity.

[xc] "It did not even enter the minds of most of our philosophers to doubt that the state of nature had existed, even though it is evident from reading the Holy Scriptures that the first man, having received enlightenment and precepts directly from God, was not himself in that state; and that giving the writings of Moses the credence that any Christian philosopher owes them, it must be denied that even before the flood men were ever in the pure state of nature . . . ." Rousseau makes this statement in the section that precedes the first part of the Second Discourse. *Discourse on the*

What was done in the universities—chiefly in the Protestant universities, because this modern natural law was taught in the Protestant universities—was to say that the state of nature is a merely hypothetical concept and merely means a state which never existed, but which we assume for convenience sake in order to understand the legal status of men who are not subject to government or who are not members of any society. This is mere fiction, useful for making things clear. That was the predominant view. I believe Pufendorf had this view. If I remember well, it was the ordinary view of the late seventeenth and eighteenth centuries. But this surely gives a very insufficient picture of the enormous dynamite of the state of nature concept and which implies simply the possibility of such a return, disregarding everything established as possibly, and even probably, based on human error and folly and going back to the solid ground of nature—and as far as that affects human society, that means [the] state of nature, and there find the true right of nature. That is what these revolutionary thinkers tried to do.

Student: Isn't that the Marxist position of alienation in capitalist society . . . .

LS: Sure. But Marxism is a later form where the concept of natural right has been abandoned, at least as part of the doctrine. Why was Engels so eager to prove that there was an early communism, a primary communism? And even matriarchal society? Why was he so eager? The Marxists could very well say what these savages at the beginning did[87] [everything] very lousy, and we are concerned with the end state. Why are they so eager? Still, I think as a relic of the seventeenth and eighteenth centuries, we have to go back to pure nature, and there to find the ultimate justification. I believe it is not necessary for an[88] [orthodox] Marxist to do that, but so it happens—at least [so] Engels stated, and I do not now remember how much Marx—

Student: Is there a possibility of an in between state, say of society, but not civil society?

LS: Sure.

Student: I was thinking that Grotius seems to use the word *societas* and *civitas* with some distinction,[89] [which] appears to a certain extent to be a contradiction. He says in the beginning that man is naturally sociable, and then he says that man has to band together in civil society later on.

LS: That he makes a distinction between *societas* and *civitas* is perfectly clear, because society means any association. If you have a club for playing guitars, that is *societas*, or if you have a trade union or invest money in drugstores, that is also *societas*. But the key point of what you mean is something else, not the small societies of this kind. They are not so interesting. But what we now mean by society—how is it now said? Society is responsible for the fact that this boy has [inaudible] license. You do not mean any trade union or something of this kind, but something else.

Origin and Foundations of Inequality Among Men, in *Rousseau: The First and Second Discourses*, trans. Roger D. and Judith R. Masters (New York: St. Martin's Press, 1964), 102-03.

Now in the pre-Hobbean form of the doctrine of the social contract, the following construction was made. Men are by nature individuals or in families, that doesn't make any difference, but surely no higher unit than the family. Then they form a society, and this can be made only by a pact because they are by nature independent of each other. This is the social contract properly understood. Now after having done that, they see very soon that they must have as it were agents for their society—governments, rulers. And so another contract is needed: the compact of subjection. Social compact comes first, the compact of subjection comes after. This implies of course that society is a moral or[90] [legal] person independently of the government, because it was society established by the primary contract which[91] [set] up the government, simply. This is[92] [pre-modern], although fully developed in the sixteenth century. This is old stuff somehow, going back to Greece and some points developed in the Middle Ages, and now the revolutionary change by Hobbes accepted by Locke and Rousseau, the three most radical thinkers of this period. There is only one contract, *i.e.*, the social contract. And the contract of subjection is identical.

In Hobbes's construction, we individuals contract in the state of nature with each other to the benefit of a third party, the future government. We oblige ourselves towards each other to obey that. That means the government is not a party to the contract. The government is truly absolute. Fundamentally, this is Locke's view of the situation too. But still, Locke marks also the transition to Rousseau, and Rousseau said there is only one contract, and that is the social contract by virtue of which society comes into being. There is no contractual relation between society and the government. Governments are merely the agents, absolutely the dependent agents of society. They have no rights against the people. The traditional doctrine always had this difficulty, that there were two equal partners, the people and the king, and one did not know which is which. Who has the decisive right? All the conflicts of the Middle Ages and wars of barons and what have you come from that. And also the conflict between the emperor and the opposite power. Now what the modern doctrine tried to do is abolish this source of insecurity and anarchy forever. There is one clear place in every society where you have full governmental power. It may be the people, or they may be a part of it, but there is no possibility of splitting power. There is only one contract.

But I have to add one point. There was so much common sense in the traditional notion of splitting of power, or to use a more dignified expression, of separating power. One of the pupils of these men I mentioned, namely Montesquieu, restored the doctrine of the splitting of power, but on the new basis. That was a very complicated and interesting theoretical achievement. In the Montesquieuan scheme, you have this part of commanding power in the executive, that in the legislative, and that in the judiciary. There can of course be conflict, but Montesquieu's tacit argument is better conflict and deadlock than tyranny. The Federalist construction, *i.e.*, the American Constitution, differs from Montesquieu decisively, because from Montesquieu's point of view the three ingredients, at least two, may rule each in its own power, *i.e.*, the executive may be a hereditary king who does not owe his power to any delegation of authority by the people, and theoretically that could also be true of the judiciary. But according to the *Federalist Papers* or the American Constitution, all power is necessarily derived from the people.

See the very beginning of the Constitution. So here you have a very interesting combination of the "sovereignty of the people" doctrine with the older doctrine, which meant in fact a questioning of the[93] [simple] sovereignty of the people.

We must stop here, but I hope you see it is necessary to go back to this earlier stage in order to see in a fluid condition what we [see] now today only in a congealed condition in which the subtle things are no longer visible to the[94] [naked] eye. From this point of view, one could say that historical studies play a similar function in the social sciences as the microscope has in the natural sciences.

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[2] Deleted "if."
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[26] Deleted "*Civil*."
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[28] Deleted "derivative from."
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[31] Deleted "but had in."
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Session 4: October 15, 1964

Leo Strauss: [In progress] [i]Self-defense on grounds of fear is admitted by Grotius, but with much stricter limits than by Hobbes. If you are apprehensive in a very general sense, or perhaps unreasonably apprehensive, this does not give you a right: it must be a clear and present danger, not a presumed danger. Even if we assume that the two men are sober and prudent, it depends a bit on the assailant, whether his picking up a stone is a perfectly innocent action or speaks of danger. The ground of the difference is the different estimate of what you actually[1] [make of] the state of nature, in other words, the absence of civil government.

What is the situation of individuals over against each other? Is this a situation in which you can have a reasonable trust in your fellow man, as Grotius would suppose,[2] or one in which you cannot have any trust, as Hobbes would suppose? More simply stated: if the state of nature is bad (Hobbes's view), [or] if the state of nature is good (Grotius' view). Now Hobbes uses a word—he is always a master of clear language: nature dissociates man. Grotius says nature sociates man, if we can say that. Man is by nature social. This has something to do with the question of providence and this would mean, to the extent that Grotius teaches natural right, to what extent is providence a rational truth, truth by reason? We have to wait. We don't have sufficient evidence for that.

Grotius is very anxious to make a distinction between the natural law and the divine law, and it is perfectly clear why he does this, because after all there were in his age sufficient connections between Christians and non-Christians. Think of the conquest of America, especially [the] Spanish and the other conquerors of South America, the relations with India, China, and these were the demands which Christians could make. They could not make them as Christians, from Grotius' point of view, but only as rational beings. This is a great, practically important question. The question is whether it is meant to have an intra-European or rather intra-Christian practical consequence, and this depends on the question to which I do not have an answer but which one cannot help raising.

Some of these writers of the seventeenth century anticipated a condition in which the legal order would be fundamentally secular, and then the Christian order would not as such be obligatory from the point of view of law. In the case of Hobbes, one can be sure of that. In the case of Grotius, I think not.

You also mentioned the question of the Mosaic law. In some cases, or in one case, Grotius interprets it by reference to a law of [inaudible]. Why does he do that? What is the meaning of that? The most obvious meaning, I believe, is this, that by showing that other nations, wholly independent of the Jews, had even these legal provisions. This is at least an indication that this is natural law or law of nations, and not necessarily divine law. We can leave it at the time being with this remark.

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[i] The session began with the reading of a student's paper. The reading was not recorded.

At the end of our last meeting, I was led to give a kind of lecture instead of a discussion, and thinking back on that, I decided to give another lecture [on] some things which I said in a way, but for those who have not taken such seminars, in a probably wholly[3] [opaque] way in my introductory remarks.

Now this is the question, the most obvious question: Why do we study Grotius, or for that matter, any other books of that kind? Let us begin at the beginning and start from some simple verities. From our present situation, and I do not mean on the day of the elections but in a somewhat fuller sense of the term, our present confusion. Again, the most external thing—I do not want to go into value judgments or other things in the social sciences—the[4] [development of the] H-bomb, [for example]. This enormous increase in man's power which has led to a danger to which man was never exposed to before. If you read any account of the most barbaric and terrible times, they are nothing compared to the danger[5] which mankind faces now. A promise and a hope has become a very great danger. A promise and hope from scientific knowledge—something has gone wrong. Regardless of how one judges practically the prospect of a nuclear war, the mere fact that this kind of thing is possible. Our practical judgment depends on the present situation—the United States and Soviet Russia. How this thing will look, say, after a sufficient spread of[6] [time], fifty years from now, no one will dare to say, because no one will know who governs what country when. In principle the danger exists.

The promise was science for the sake of power, improvement of man's condition. This was made in the early seventeenth century by Bacon and Descartes and Hobbes, and many[7] men who followed it—a fundamental change in the character of theoretical philosophy or science, because up to the eighteenth century philosophy and science were not[8] [distinct]. Now this fundamental change in the character of theoretical philosophy was accompanied by a corresponding change in practical or political philosophy. We can characterize this change as a much greater hope of freedom, both political and other, for all men, than was ever entertained before. We could also say the prospect of what now would be called a perfectly open society, in both senses of open—universal, no frontiers to speak of, and also immense openness or mobility within. So such a fundamental change has undoubtedly occurred and I believe no one can deny that. But the situation with which we are now confronted—and you are perhaps the first generation which is directly confronted with it—is, then, was this modern decision so seemingly beneficent, generous, charitable and so on? Was this a wise decision?

What has been a certainty for centuries has now become a matter of doubt. This is the famous quarrel of the ancients and moderns: ancient, *i.e*., pre-modern understanding of the purpose of philosophy or science, or the modern. It seems to me that this quarrel between the ancients and moderns is the rock-bottom issue now known under the heading, conservative[9] [divergence], of which we spoke on a former occasion, which is as ordinarily stated [in] a rather superficial, although practical[10] [way].[ii] Now this quarrel

[ii] Strauss may be referring to the discussion at the beginning of session 3 regarding the divide between conservatives inspired by free-market economics and those oriented by traditional social morality. Economic conservatives, believing that the pursuit of self-interest should be the

again becomes a question. It is no longer possible simply to accept modernity or progress as it was once, and one can say that clearly the communists, and to some extent the liberals, by which I do not mean of course that the liberals are "pinkie" and cannot be trusted—of course not, but still as groups they permit least of all doubt of modernity and progress, whereas among the conservatives one finds more of such people. If we are then compelled to face this issue, the quarrel between ancients and moderns as it was called in the seventeenth century—the general character of the [modern] development . . . .

There is, first of all, something which at least in retrospect looks like groping for something radically new, and we may take Grotius as a good specimen. Then in the generation after him, there takes place the break with full clarity, speaking of break with the earlier tradition, and this is of course represented by Descartes and Hobbes above all, and the victory of this revolution which culminated and which became obvious to the meanest capacity with Newton.

But even at that time there were people whom we can call reactionaries, people who did not want to have anything to do with this. Perhaps the most famous of them is Jonathan Swift, whose *Battle of the Books* is not his best work but still a clear sign of it, and especially *Gulliver's Travels*. I remind you only in the third book the description of the research projects in[11] [Laputa]: how to produce sheep without wool. It's useful, only it doesn't make any difference;[12] and other things which have a very great meaning in spite of or because of the amusing presentation. To some extent, also incidentally, [in] Shaftesbury at the end of the seventeenth century, a pupil of Locke (Locke was his tutor for some time), but clearly opposed to Locke and also to Hobbes, there was an attempt to[13] [reinstate] the older principles with some modification.[iii]

To mention only one point: [14]what German philosophy did between Kant and Hegel, which was an attempt to restate and restore moral and political philosophy to the high level it had had in Plato and Aristotle but on a new basis, on the basis created by people like Hobbes and Locke. German philosophy had a terrific effect on present-day thought, even if [present-day thought is also] violently opposed to German thought. Basically one could see this in the case of John Dewey, for example—how much there is of Hegel and so on in John Dewey.[iv]

Now these broad things can be established fairly simply and must always be kept in mind if we do not wish to lose our bearings. The defects, which of course we cannot neglect, are of very great complexity and very technical, and must be faced as such. These technical details have this immediate effect, that they blur the fundamental issue. I give

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lynchpin of social order, would then align with modernity, while the social conservatives, concerned with morality and character, would align with the classical view.

[iii] Anthony Ashley Cooper, Third Earl of Shaftesbury (1671-1713), whose education was supervised by Locke. His most famous work, *Characteristics of Men, Manners, Opinions, Times* (1711) was to some extent a departure from Hobbes and Locke in the direction of classical thought.

[iv] John Dewey studied with Hegelian philosopher George Sylvester Morris at Johns Hopkins. The influence of Hegel can be seen in Dewey's *Psychology* (1887), for example, and *Art as Experience* (1934).

you an example with which you are familiar, which blurred the fundamental issue, and many historians fall victim to that, but we must avoid that and we can avoid it only by not assigning the same weight to every book. In other words, if you make a purely statistical study, say, of the state of mind in Western Europe around 1650, then you see a tiny minority who are the[15] [innovators], and the large majority accepts the traditional thought, of course. This kind of statistic is of small groups,[16] [but] potentially very powerful. When Lenin assembled his six or seven guys in Switzerland during the First World War, these were just some absolutely powerless people, and eventually they proved to be more powerful than the most powerful men then controlling[17] [Russia], so we must be careful.

There is another point which I would like to mention, too. When we speak of the pre-modern or the ancient, there is a certain ambiguity there which is not considered by all people, and disregard of that ambiguity makes life much easier. But still, since we are not here for living easily, we must avoid the temptation. For example, in the discussion of natural sciences, you read even in the learned books—here you get a description of an Aristotelian, cosmological physics and say, look, a finite universe and all these other things, and how things changed in the fifteenth and sixteenth centuries. There were classical philosophers or scientists who asserted the infinity of the universe, quite a few. In other words, there is another anti-Aristotelian or anti-Platonic tradition which is as much a part of the Western heritage, although it was much less historically powerful in the past,[18] [than] the Platonic-Aristotelian view. Now to limit myself to political philosophy: there is not only Plato and Aristotle. There is also Epicurus and Democritus; there are sophists. So if we want to define precisely what the peculiarity of this modern change is, it is not sufficient to compare Hobbes with Aristotle, which is very easy to do. You have also to compare Thrasymachus or Callicles or Epicurus. Is this clear? This is [not] trivial, but very important. I have seen it very often neglected.

Now I come back to what I said last time. One of these most important technical and blurring issues is the notion of the social contract, because the social contract played a very great role in pre-modern thought. By pre-modern I mean, say, pre-Hobbes. It plays a very great role of course also in modern thought, in Hobbes, Rousseau, and Locke. But if two men use the same word, they do not necessarily mean the same thing. It certainly requires a more subtle consideration. Now I would like to mention only one point here which I forgot last time. The social contract doctrine was developed[19] [early] and goes back to olden times. There are two things to distinguish, which I mentioned last time: the political contract, the contract between the people and the king. This had played a very great role in the Germanic nations, the relations between king and people, coronations, and this kind of thing. The more fundamental thing is the social contract, a contract by virtue of which a people, a society, arises at all. It may then set up a government or, in particular, a monarchy. Now this doctrine means strictly speaking the social contract doctrine, that society emerges by virtue of a contract, of a human action. Society does not exist by nature. By nature, man is asocial and of course also apolitical. At the very least, no man is by nature the ruler of anybody else.

Let us disregard the uninteresting case of the family. Most people would have admitted that parents are by nature the rulers of their children, but that is not politically interesting. But no grown-up man is by nature the ruler of anybody else. Now inverted, all men are by nature equal. This is, of course, a very old story going back to who knows when, although the clearest statement from early times we find in Roman law,[v] though these Roman lawyers were not the originators of that. We have to do a lot of guessing in order to place it somewhere. Here of course we have a clear contrast between the Aristotelian and Platonic tradition and these other traditions. According to Aristotle and Plato, men are by nature unequal, and therefore there can be by nature men who are the masters of others.

We will come across the problem in Grotius, who as in many other cases, hedges here also. If all men are by nature equal, then this is a fundamentally democratic doctrine. It developed its full democratic meaning only very late in modern times, for reasons for which we would have to investigate, which we do not investigate in this particular course. So you see how much this issue is in touch with our immediate political problems.

The social contract concept is one of those concepts which cannot be left at simply saying [that] this doesn't exist before. The state of nature, that is perhaps also of the same kind but not as obvious as the social contract. The doctrine of sovereignty—one can say with greater certainty that this is a modern doctrine which had emerged clearly in the sixteenth century with Bodin,[vi] who still did a lot of hedging, but in Hobbes two generations later, this is fully developed. I thought we should mention this, so we do not think that we are just wasting our time with antiquarian discussions. Is there any point anyone would like to raise in connection with what I said?

Student: What is your purpose specifically in view of what you just said in going to the works and looking at them minutely?

LS: To understand what is the issue between the ancients and the moderns. What was implied in that great decision which altered the character of both theoretical and political philosophy in the seventeenth century? Surely in the case of Hobbes this is much clearer to see, and therefore Hobbes belongs, from the point of view of theoretical[20] [depth], to another league than Grotius does. These things were prepared: Since the sixteenth century at the latest, something was stirred underground which shows itself in all kinds of places, and then this seemed (and I cannot express it other than with this image) that at a certain moment the baby was born. He was no longer in the womb, or beneath the ground, to change the metaphor, but became visible. It became clear in the famous statements of Bacon and Descartes and Hobbes: hitherto all philosophers were wrong, fundamentally wrong—we can't deny that they said something, but fundamentally wrong. A new kind of approach to all things, natural and political, was required, and from this moment on this new thing emerges. Even in Hume's time, the middle of the eighteenth century, the question is still discussed, the ancients and the moderns. How

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[v] See, *e.g.*, Justinian, *Institutes* 1.2.2.

[vi] Jean Bodin (1430-1596), whose *Six Books of the Commonwealth* (1576) is often credited with pioneering the modern notion of "sovereignty."

does he call the philosophy of the ancients and the moderns in his *Treatise of Human Nature*? Different sections deal with that.[vii]

So for some reason the issue has become blurred for a couple of generations. For example, Carlyle is a good example.[viii] For Carlyle the situation is this. There was ancient classical philosophy, say, Plato and Aristotle, and this was radically changed with the Stoics because the Stoics broke away from the *polis*, city-state, and assumed the equality of all men and natural law, and this was the basis of political thought from the Stoics, say from the moment that Aristotle expired until Burke raised his[21] [hand] against the French Revolution. This is the schema which Carlyle uses. He is the only man in the last generation who went over the whole ground. But the whole thing is very unreliable, it's very superficial but of course not entirely groundless. As the example of social contract shows (which I discussed) there are concepts which go through and are apparently indifferent to the great change. A discussion of the political issue [is carried on] in legal terms, of course natural law terms, but still law. This is something very common to the Middle Ages and up to the eighteenth century inclusive. From this point of view you can say here you have an age of realism, natural law, reason, whereas Aristotle's *Politics* and Plato's *Laws* are free from that. Then in the nineteenth century, also these natural law discussions have lost their importance. But there is some effect[22] [to be sure], because modern natural law, what Hobbes started, is fundamentally different from pre-Hobbean natural law.

Student: What is the difference between the classical mathematics and the modern mathematics? You mentioned[23] [Descartes].

LS: I know this only second-hand, of course. I do not know. I have no judgment on that. But I know only the very well-known fact that one and two are [considered] numbers in the same sense[24] [as] three, four, five, etc.,[25] [only as] a consequence of the great change. For Aristotle perhaps two, but surely one is not a number. Very simply, you wouldn't say "all," if you have a single[26] [thing]. [LS apparently demonstrates.] When you say "all things," you mean at least three. Numbering proper presupposes surely more than one. This is one sign, and of course that there can be such things as zero as a number and the fractions, this had a terrific change. Also, the very possibility of analytical geometry, so that you have one coordination of numbers, and lines, curves, and so on. This of course presupposed the great change. Now I know this only from secondhand, so don't trust me.[ix] There are certain things which look like analytical geometry in the fourteenth century, Nicola[27] [da Cusa][x] and such people, but here again it requires a subtle discussion to see the fundamental difference between these things which look like analytical geometry and what Descartes and his successors did.

[vii] Hume, *A Treatise of Human Nature*, 1.4.3, "Of the Antient Philosophy," and 1.4.4, "Of the Modern Philosophy."

[viii] Strauss is probably referring to A. J. Carlyle, *Political Liberty: A History of the Conception in the Middle Ages and Modern Times* (Oxford: Clarendon Press, 1941).

[ix] Strauss may be relying on Jacob Klein's book, *Greek Mathematical Thought and the Origin of Algebra* (Cambrdge, MA: MIT Press, 1968).

[x] Nicola da Cusa (1401-1464), German philosopher and mathematician.

Student: Do you feel that the modern confusion issue, that which you mentioned in the beginning of your talk, derives purely from external reasoning which you mentioned, like say the hydrogen bomb, or do you think internal causes—

LS: I would never believe that these changes are merely external. I started this only to make clear in the simplest possible way that a certain doubt of this development, which would seem to be merely reactionary, narrow-minded, is now no longer [so][28] [on] the face of it. There is a very vulgar word in English (which I loathe to use), a certain optimism which has been prevalent for three centuries. It is no longer possible, and I only try to express this in somewhat more precise terms.

Student: The break you speak of is in many ways a break in natural science, a shift from the teleological natural sciences—

LS: But this does not suffice, because the[29] [ancient non-Aristotelian] natural sciences also were not teleological. Never forget that.

Student: But up until this point the political climate of a person like Aristotle is at least congruous with this natural science. There is a certain unity to it.

LS: If you look more closely, this enormous work of Aristotle was decisively prepared, as I think you learned in elementary school almost, by Plato, although there are great differences. And Plato himself claimed to present to us the teaching of Socrates. Socrates effected a break within classical antiquity, which became decisive in the transition. I speak again very superficially, but we have to start from the surface. What do we learn about Socrates from Aristotle's broad schematic statement?[xi] Socrates turned his back on natural[30] [science] and was concerned only with ethics, in the broad sense which includes political too. This is the impression you get from reading Plato.

So in a very strange way, a radical change in natural philosophy, call it metaphysical or whatever, was begun through reflections on moral problems and political problems. I wonder whether something of this kind has not happened in modern times, too. Who effected for the first time the break in the classical tradition? Socrates, Plato and Aristotle,[31] [over against] Epicurus and the sophists. [Who effected the modern break?] Hobbes very clearly, sure, but Hobbes did not start that. Hobbes gave it a specific[32] [turn] and a very important[33] [turn], but the first man who said we must make a radically new beginning, all previous writers are fundamentally[34] [wrong], was Machiavelli. No one would say that Machiavelli had any revolutionary effect for the natural sciences. So it is not necessary, even if it were true, that the science of the whole, call it natural science, call it metaphysical, is in the order of the sciences the higher, that it must be the originating discipline.

Student: But still, surely never before has science so shaped every aspect of life, and wouldn't this require perhaps a re-opening of the question within the natural sciences?

[xi] Perhaps a reference to Aristotle *Metaphysics* A, chapter 6.

LS: This fact is a part of the problem which you mentioned. Science had no social effect, so to speak, up until 1600,[35] and from then on, at an ever increasing pace, a terrific social effect. This means the wholly modern [version of] science has that effect; that is part of the problem of modern science.

Student: But you assert the autonomy of political and ethical science. You leave the modern natural sciences—

LS: A certain precedence one can assert, but a simple autonomy that's hard to say because they are so[36] intertwined. But what is the meaning? To what extent do you make an objection?

Student: It seems to me that, for example, modern relativism is grounded in the [modern] view of the universe, and simply to leave that view of the universe unassailed or predominant and look—

LS: But this is—let us say more generally, what is generally understood now by political science is of course meant to be an extension of natural science, and its methods, to political phenomena. That is clear, and this is connected with the fact of relativism, but this is not so simple. The man who demanded for the first time that we must have a "social physics"—this is an expression of [37] [Quetelet][xii], used also by[38] [Comte] later, but used first by[39] [Quetelet]. [Comte was] the founder of[40] [positivism], but[41] [Quetelet] was not a positivist.[xiii] For him, it is perfectly clear that there are, in present-day language, absolute values. You see,[42] [relativism] is a relatively late development and I am inclined to believe that the social science relativism so powerful now owes its emergence to the influence of German idealistic philosophy. That is a very complicated thing. The scientific tradition was not relativistic, as you can see in reading Hobbes and Locke, and the whole men of the Enlightenment, who took it for granted that this is the natural order of human life. There was no question, and[43] [Quetelet] still belongs to this kind of people.

Relativism, in the present-day sense of the term, [arose in opposition to utilitarianism]. I believe it is not an accident, that the greatest man who[44] [argued for relativism] with greatest success was Max Weber,[45] who was very far from being a utilitarian. You see, the moment utilitarianism, *i.e.*, the simple principle [of] the greatest happiness of the greatest number, understood in very crude terms—better food, better housing, better schooling, the Great Society as Lyndon Johnson would call it—in the moment this was

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[xii] Adolphe Quetelet, *Sur l'homme and le développement de ses facultés, ou Essai de physique sociale* (Paris: Bachelier, 1835).

[xiii] Auguste Comte (1798-1857), the founder of positivism, is clearly the latter individual Strauss is referring to in this string of "inaudibles." For his development of the concept of "social physics," see Book 6 of his *Positive Philosophy*. The term had been used earlier by the statistician Adolphe Quetelet, who is therefore presumably the earlier thinker referred to.

questioned, people said this kind of utilitarianism may be very humane and so forth, but it may also lead to a very great degradation of man. And then it became a matter [of choice]: the simplest was to say: Well, you can be utilitarian, that is your choice, and[46] I can be anti-utilitarian, that is my choice. I exaggerate, but I believe that[47] [this] is the genesis [of relativism], not scientific method, and to try to link it up with the "is" and "ought" distinction as made by Hume in one sense and by Kant in the other is wholly unfounded, because Hume was not a relativist and Kant was not a relativist. That's a long story. Well, I must leave it now, although I probably didn't cover the issue, but I didn't see sufficiently what you meant.

Student: From your lecture, the following point occurred to me, that the basic issue between the ancients and the moderns might not be at first what the best regime is, because one could give a classical argument for democracy, but whether man is virtuous, looking at Hobbes against Plato and Aristotle, that—

LS: This is to some extent true, but on the other hand I believe it is wiser to say that these men, at least in the seventeenth and eighteenth centuries, men like Hobbes, Locke, and Rousseau, were not concerned so much with the best regime, although they were also to some extent concerned [with it], but the primary question was: What is the *legitimate* regime? Given the fact that men are by nature free and equal, which conditions must the regime fulfill in order to be legitimate, so [as] not to contradict that fundamental equality and freedom? As for the classics, the question was truly the best regime. This is the phenomenon which I have discussed as a certain doctrinairism, which was so powerful in the seventeenth and eighteenth centuries [and] which is surely absent, one can say, from the whole earlier tradition precisely because [the question], what is the just regime? means of course just under all circumstances, regardless of the circumstances. When you say "the best regime," you imply that the best regime may not always be obtainable, and you know how great an importance this plays today. That is one of the dividing lines between the so-called liberals and the conservatives, that the conservatives are not too sure that this same regime fits everything. You can also say that there is a kind of overlapping between the two camps.

Student: Where will you trace Weber's sources of thought? To which philosophers?

LS: This I believe would be fairly simple. This whole thing, the greatest happiness of the greatest number, all fed, housed, clothed, educated and so on, this was criticized, I mean either in its liberal or in its communist[48] [forms]—that doesn't make any difference. This was criticized by a very well-known German philosopher, by Nietzsche, under the heading "the Last Man," the section near the beginning of his[49] [*Zarathustra*]. Weber explicitly refers to that and agrees with it. In other words, the condition of what they call materialistic happiness is somehow incompatible with the best. This was Weber's point. Therefore, he had to divorce sociology as he understood it from the utilitarian principles, and the simplest way in which he did that was to say value judgments are wholly independent of factual judgments.

Student: Then Plato is trying to avoid the condition which Nietzsche said—

LS: Yes, but the point was this. Weber said, as scientist: I cannot make[50] [moral] formulations. In other words, he felt that he was unable. He felt that the best way out of this predicament is to make[51] [the fact-value] distinction, so that the social scientists and social science are not bound to these particular values. Needless to say, there are other[52] [reasons], but perhaps [these are the] more obvious ones. There was this kind of relativism and, on the other hand, there were the military[53] [ultra]-nationalists. They occupied quite a few chairs at German universities, and these[54] [relativists] simply wanted to preserve the integrity of science endangered by fanatical believers, and the simplest way out was to say these [matters] are altogether beyond the sphere of rational knowledge. That is, of course, a great question.

Student: It seems to me that you still have the same problem if there were a city-state or a republic (like Plato's) where various nations had hydrogen bombs.

LS: But don't you see that if the scientists absolutely abstained from doing this kind of work, there—

Student: I keep seeing that the scientists were forced to do it because of [the] necessity of war.

LS: The question is whether this does not have a deeper reasoning. Archimedes too did something in defense of Syracuse, and was then killed when Syracuse was taken by the Romans. But the overall notion of science, according to which science is not in the service of practice and is fundamentally contemplative, surely acted against the desire to go in with all power for practical application. That is a very long question. There are some stories about Leonardo da Vinci, who had made some militarily interesting discoveries and did not[55] [divulge] them.

But the fundamental error is simply this: science for the sake of power. What these people did not see through [is] that[56] [from] the moment science [is developed] for the sake of power, scientists will become eminently desirable from a political point of view. Whether[57] [it] is a tyrannical or democratic[58] [polity], it doesn't make any difference. In other words, it meant a loss of the freedom[59] [for] science. Surely quite a few discoveries could not be made, could never have been made, without this enormously expensive apparatus. These great progresses of science are due to the moneyed people, private or public, who bring up the money, but you get nothing[60] [out] of it. You lose your freedom. The moral progress of some of these physicists or chemists is humanly touching if one is inclined to weep, but otherwise ridiculous. They wouldn't be who they are if these things were not made ultimately for government's purpose, if need be for the purpose of war. They didn't know that, and they are little children who shouldn't talk about political things. Even if they are Nobel Prize winners . . . . [xiv]

[xiv] A possible reference to J. Robert Oppenheimer, head of the Manhattan Project that developed the atomic bomb for the United States during World War II, and who subsequently fretted about the destructive power thus unleashed. Oppenheimer never received a Nobel Prize, however. Enrico Fermi, a Nobel-winning Manhattan Project scientist who later worried about the

Student: You mentioned the life of *Marcellus*,[61] [Archimedes developing] machines under the pressure of war, of defense[xv]—

LS: [Inaudible] but still he did certain things in order to help his home town. Do you mean he did less than he could have done?

Student: I mean that he didn't write them down.

LS: I see. I'm grateful that you tell the class the source. Plutarch's *Marcellus* is one of the major sources about this problem, because here we have in a way the greatest physicist of antiquity, [Archimedes], confronted with a practical problem of the utmost importance.

Now let us turn to a coherent discussion of[62] [paragraph] 6.[xvi] At the beginning of[63] [paragraph] 1, Grotius makes a distinction between the justifying causes and the persuasive causes, or we can say the causes of expedience, and he is of course concerned only with the justifying causes, [for] the causes of war which may justify from the point of view of utility, are not necessarily just. This is of course a great[64] [problem]—that the just causes are not necessarily the expedient causes. In section 2, the time is too short for reading it,[65] the two central quotations from Demosthenes and Dio Cassius seem to imply that only a just war gives the army good hopes of victory, *i.e*., offer the prospect of utility. That is a complicated matter because it is perfectly sufficient[66] that they are conditioned by propaganda, to believe in the just[67] [cause]. To speak only of Hitler's army, they believed in the justice of wars. There is no question. Here is the great difficulty, the cleavage between right and utility. That is of course what is a strong point of Machiavelli, and ultimately also of Carneades,[68] to whom Grotius had referred.

In section 3 he makes quite clear this point which is indeed also true—and this is a great argument against Machiavelli—that there must be an essential difference between states and kingdoms on the one hand, and gangs of robbers [on the other]. Otherwise, how can you respect your society? How can you respect your government, if there is no essential difference?

The cause of a just war is nothing but injury, and the injury is of three kinds, as was made clear in this paper. Either an injury not done, so that it will not be done—an injury apprehended—and then an actual injury which either may have to be repaired, or to be punished.[xvii] This is the general plan of the second book. Then the simple division of these injuries may refer to the body, life and limb, or to things, to property. Therefore, he

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implications of nuclear power (and who taught at the University of Chicago) may also be intended.

[xv] Archimedes' story is told in Plutarch's *Life of Marcellus*.

[xvi] We are now in Book 2, at 2.1.1.6.

[xvii] The three causes as Grotius lays them out at *JBP* 2.1.2.2 are "defense, recovery of property, and punishment." The first allows for limited preëmptive or anticipatory action.

discusses first the natural right of having property, and then the natural right of having body.

The right of self-defense can be exercised without any regard for the injustice of the other side. In other words, the man may be an innocent man but who, on the basis of some error, some justifiable error,[69] [is attacked]. This in itself would lead to the possibility of a war which is just on both sides, and this is not discussed here by Grotius. This conclusion is not drawn by Grotius.

In paragraph 4, still in the first chapter,[xviii] nature, and hence natural right, seems to be more concerned with self-preservation of the individual than with society. This has something to do with the distinction between the *prima naturae*, the beginnings of nature, and the end, the end of man, which he took over from Cicero. In this passage at any rate, Grotius disregards the end, or replaces it by the law of charity.

Grotius goes much beyond Hobbes of course by taking chastity[70] or the violation or threat to one's chastity as a ground for just war, war of individuals.[71] He does not answer the question, however, whether this ground of war is based on natural right or only on the *ius gentium, i.e*. (in his sense), having a positivist basis, an agreement among people. He does not answer that.

[change of tape]

The killing for slapping is permitted, from the point of view of right strictly understood, apparently because you never can tell how far it will go.[xix] You may break some of your bones by doing that. But it is surely forbidden by the Gospel, and it is disapproved also by philosophy, *i.e*., from the higher point of view which considers not merely the *prima naturae*, the beginning. One should not on such a ground kill a man, but from the point of view of right strictly understood, you may do it because you don't know how far this will go. The whole paragraph in which he discusses this, paragraph 10, opposes[72] [feudal honor. Honor] is not a ground for beginning a war. That's a silly thing from Grotius' point of view.

He discusses here also the case of single[73] [combat]. He makes clear that preventive war is unjust.

Let us read paragraph 14.

Reader:

> The question is raised by some whether the civil law at any rate, since it contains the right of life and death in permitting that a thief be killed by a private individual, does not at the same time free the act from all guilt.
>
> In my judgment this ought by no means to be conceded. In the first place, the law does not have the right of death over all citizens for any

[xviii] *JBP*, 1.1.4.
[xix] We are now at *JBP* 1.1.10.

> offense whatever, but only for offenses so serious that they deserve death. Altogether worthy of approval is the opinion of Scotus, that it is not right to condemn any one to death except for the crimes which the law of Moses punished with death, or, in addition for crimes which, judged by a fair standard, are equally heinous. For in this so serious manner it seems possible to attain a knowledge of the divine will, which alone gives peace of mind, from no other source than from that law, which does not with certainty appoint to the thief the penalty of death.
>
> Furthermore, the law ought not to confer, and ordinarily does not confer, upon private individuals the right to put to death even those who have deserved death, excepting only in the case of the most atrocious crimes. Otherwise, the authority of the courts would have been constituted in vain. Wherefore, if a law says that a thief is killed with impunity, we are to consider that it takes away a penalty, but does not also confer a right.[xx]

LS: In other words, it gives a killer impunity. It gives him impunity, but does not make his action just. Is the distinction not intelligible? Quite a few things he may do without being punished, and no one would say it is a just action.

And [paragraph] 18, at the beginning.

Reader:

> Not less unacceptable is the doctrine of those who hold that defense is justifiable on the part of those who have deserved that war be made upon them. The reason alleged is that few are satisfied with exacting benefits in proportion to the injury suffered. But fear of an uncertainty cannot confer the right to resort to force; hence a man charged with a crime, because he fears that his punishment may be greater than he deserves, does not, on that account, have the right to resist by force the representatives of public authority with the desire to take him.[xxi]

LS: Here we see the difference very clearly. What does Hobbes teach on this subject?

Student: You can do anything for the sake of[74] [survival].

LS: Even if you are arrested and have been lawfully condemned to death, you still preserve the natural right to kill the guards.

Student: Doesn't he also remark that that is the reason a person is[75] [guarded] by men who are armed because[76] [of the possibility of resistance]?

LS: Is this a good argument? If people take care that something not be done, does it prove that the act in question is lawful? I believe it would lead to large consequences.

[xx] *JBP*, 2.1.14.
[xxi] *JBP*, 2.1.18.1.

Student: There are some prior considerations—the fact that the state is instituted [for the] defense of the individual . . . .

LS: That's another matter. This would mean no one can be presumed to have entered civil society in order to be killed,[77] [under any circumstances]. He entered society in order to protect his own life, for the price of obeying the laws, and hence also of getting those punishments of a lawful society. It was in his power not to commit treason or murder or whatever it may be.

Now we turn to chapter 2.[xxii] Here he begins to discuss injuries received and not merely expected, and first against that which belongs to us, and what belongs to us can either be common, in other words, men would be only joint[78] [owners] or private. In brief, he discusses here the origin of property. Now originally everything was in common. That is an old story. Whether that is true or not, we cannot go into that, but that was the assumption generally held. When everything was common, things could become private fundamentally by occupation, by occupying[79] [land] or taking possession of whatever it may be. The description which he gives here in paragraph 2, the condition of the first man, is largely based on pagan authors, not on Christian authors or on the Bible. Hence, of course it is not easy to integrate these conditions he describes here into biblical history. We might read paragraph 2, section 3.[80]

Reader:

Harmony, however, was destroyed chiefly by a less noble vice, ambition, of which the symbol was the Tower of Babel.[xxiii] Presently men divided all countries, and possessed them separately.[xxiv] Afterward, nevertheless, there remained among neighbors a common ownership, not a plot to be sure, but a pasture lands, because the extent of the land was so great, in proportion to the small number of men, that it sufficed without any inconvenience for the use of many;[xxv]

> The field, with bounds to mark, or limits set,
> Was not allowed.[xxvi]

> Finally, with increase in the number of men as well as their flocks,[xxvii] lands everywhere began to be divided, not previously as by peoples but by families. Wells, furthermore—a resource particularly necessary in the dry regions, one well not sufficing for many—were appropriated by those who had obtained possession of them. This is what we were taught in sacred history, and this is quite in accord with what philosophers and poets, whose testimony we have presented elsewhere,

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[xxii] *JBP*, bk. 2, chap. 2.
[xxiii] In original, not "noble vice"; "ignoble vice."
[xxiv] In original, not "divided all countries"; "divided off countries."
[xxv] In original, not "not a plot to be sure, but a pasture lands"; "not of flocks to be sure, but of pasture lands."
[xxvi] Virgil, *Georgics* 1.126.
[xxvii] In original, not "their flocks"; "of flocks."

> have said concerning the first state of ownership in common, and the distribution of property which afterwards followed.[xxviii]

LS: There is no problem because the Bible and the philosophers and the poets agree on the first state of man, which is not called here natural state but the first state of man, and therefore this is a perfectly solid presupposition for natural right: since the pagan philosophers and poets say the same thing, there is nothing peculiarly theological about that. But still, if one would go into more detail, questions would arise which he does not bring up, which we discussed at some length when we discussed[81] [the state of nature] in an earlier seminar.[xxix] The chronology presupposed by the pagan authors, especially those reporting Egyptian history[82] [to a great antiquity],[xxx] and biblical history,[83] [are most unreliable].

Now in paragraph five, the main point which Grotius makes—how does private property arise. What is the general answer?

Student: From the increase in population.

LS: No. I mean what justifies private property, since by nature all things were in common.

Student: The need of self-preservation.

LS: No. The legal basis is a pact. The common owners agree to divide up common property, and the pact may be explicit or implicit, and the occupation is based on the implicit pact; the other is tacitly agreed to. But what you say, the linking up of the right to property with the right of self-preservation, who made this construction?

Student: Rousseau.

LS: Yes, but—

Student: Locke.

LS: Locke. Locke discusses this at great length and denies that private property can be due to any pact. The source of private property is in the individual and in his right of self-preservation. True, in order to preserve yourself, you need food, so the food would not be of any use to you if you would not appropriate it in such a way that no one can take it from you. The vulgar expression for this thing is, of course,[84] [eating]. Once it has gone beyond a certain point, it is lost to everybody. So the ruthless appropriation for your own benefit alone is based on the right of self-preservation. And then Locke shows, with

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[xxviii] *JBP*, 2.2.2.3.

[xxix] If "state of nature" is a correct surmise, Strauss discussed the topic in session 3.

[xxx] Strauss may have in mind Diodorus Siculus, who wrote a *Library of History* that included an account of a precivil, bestial condition of men, and of most ancient Egypt (*Library of History* 1.8ff).

a certain plausibility, that what is true of the apple which you pick is true also if you appropriate large parts of land, and here there is an intermediate point which is not mentioned also by Grotius as such, and that is labor. So it is not occupation as occupation, but labor: the labor involved in occupation, the labor involved in picking an apple, or whatever it may be. There are some stirrings of that very interesting thought in Grotius, but of course never clear.

The sea cannot be appropriated, not even by peoples, because it cannot be occupied, and this leads to perfect freedom of the sea, which was a major preoccupation of Grotius, who defended the course of Dutch commerce.[xxxi]

In paragraph five, the expression occurs,[85] "[*illo primaevo statu*]," "that primeval state."[xxxii] For those who are concerned with the more subtle question, it is not called the natural state, but the primeval state. This right of treating all things as common revives[86] [in] extreme necessity. This was, I think, always recognized and is today recognized. If you are about to starve, you may take a loaf of bread from the bakery. You are not guilty of [theft for] that. This is not only an unpunishable action, according to Grotius, but a just action, because the good which you preserve by that action, your life, is higher than the good constituted by breaking the law.

He also speaks toward the end of this chapter of the right of transit, not only for persons, but also for merchandise.[xxxiii] This is also based on some ancient texts. This is of course of the utmost importance for commercial society. Gronovius, the commentator whom I use, rejects this view. One would have to look up this passage in the context, in order to see whether Grotius does not go beyond what is said.

Perhaps we [might] look at the beginning of paragraph 16.

Reader:[xxxiv]

> Furthermore, a permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes.[xxxv]

LS: This, I believe, has something to do,[87] [as] Gronovius also notes, with the government of the Jews[88] [in the Bible]. Sometimes one would not know what this very

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[xxxi] *JBP*, 2.2.3. Earlier in his life, Grotius had written a lengthy treatise on the freedom of the seas (*i.e*., the impossibility of the sea being owned by anyone), *De Jure Praedae* (*On the Law of Prize*). This treatise was not published in full until the nineteenth century, but the relevant portion of it appeared during Grotius' lifetime, under the title *Mare Liberum* (*Free Sea*). Grotius' argument was directed partly at breaking up maritime monopolies and alleged exclusive trading zones, which the Dutch opposed.

[xxxii] Kelsey translates the phrase "their primitive condition."

[xxxiii] *JBP*, 2.2.13-14.

[xxxiv] In the original transcript the reader here announces the page ("Page 201").

[xxxv] *JBP*, 2.2.16.

general legal statement meant in practice. But the point here is that Grotius has not merely an interest in freedom of commerce, but also in humanity. This goes together. These two things, humanity and commerce, were then gradually regarded as natural allies. Adam Smith is a great document for this alliance.

Now a few more passages to consider in the third chapter, paragraph 3.

Reader:[xxxvi]

> To the means to which acquisition may be accomplished, all the jurists add also this, and would seem altogether consistent with nature. That—that we have caused something to come into existence.
>
> In nature, however, nothing is produced except for matter which previously existed.[xxxvii] If, then, the material belonged to us, the ownership of that which is produced would continue, even though the new form is presented.[xxxviii] If the material belonged to no one, in that case acquisition will be classed under the head of acquisition by occupation. On the other hand, if the material used was the property of another, the thing produced naturally would not belong to us alone.[xxxix]

LS: That is a perfectly sensible statement, but it shows clearly by its silence that labor is not considered as such a type of property. You must be the owner; you could have become the owner of it by occupation, but he does not understand occupation as labor. Labor would then be the common denominator of all kinds of things which you do, whether it is only picking up an apple from the earth, or transforming say a stone into a weapon, or any other transformation. This would be the common point, and Locke takes this point, too. In paragraph 6.

Reader:

> It must be noted, further, that if we have in view the law of nature alone, ownership is restricted to those who are possessed of reason. But in the common interest the law of nations introduced the provision that both instance and insane persons should be able to acquire and retain ownership—the human race, as it were, meanwhile representing them.[xl]
>
> Human laws indisputably have it in their province to go further than nature in regard to many points, but never to go contrary to nature. Hence this type of ownership, which by common acceptation of civilized rations[xli] has been introduced in favor of infants and those of similar

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[xxxvi] The reader announces "Page 206." Kelsey's translation of the first paragraph reads so: "To the means through which acquisition may be accomplished Paul the jurist adds also this—which seems altogether consistent with nature—'that we have caused something to come in to existence.'"

[xxxvii] In original, not "except for matter"; "except from matter."

[xxxviii] In original, not "the new form"; "a new form."

[xxxix] *JBP*, 2.3.3.

[xl] In original, not "that both instance and insane persons"; "that both infants and insane persons."

[xli] In original, not "rations"; "nations."

> condition, is limited to the first act, as the Schools say, and cannot extend to the second act; that is, it covers the right of proprietorship, but not the right of the owner himself[xlii]—

LS: That is clear. Someone else owns it in trust. The madman has it only in the first act, potentially, not after.

Reader:

> For alienation, and other acts similar thereto, by their very nature presuppose the action of a will controlled by reason, and in such persons a will subject to reason cannot exist. At this point you might not inappropriately refer to the statement of the Apostle Paul, that an heir, although the owner of an ancestral estate, while he is under age, differs in no respect from the bond-servants, of course, as regards the exercise of the right of ownership.[xliii]

LS: We can go on with that next time. This passage is a clear example of the difference between natural right and *ius gentium*, the right of nations, right of nations meaning here a right which is established for reason of convenience or of fairness by men, but based on some fiction. Now let us turn to the next chapter, the first paragraph.

Reader: "A serious difficulty arises at this point in regard to the right of who to capture. For since this right was introduced by municipal law[xliv]—"

LS: By civil law.

Reader:

> (time, in fact, in its own nature has no effect of course;[xlv] nothing is done by time, though everything is done in time) it has no place, as Vasquez holds, in the relations between two independent states or kings, or between an independent state and a king; nor yet between a king and individual not subject to him, nor between two subjects of different kings or states.[xlvi]
>
> This seems to be true except insofar as a thing or an act is governed by the laws of the land. But if he admits this, a very serious inconvenience clearly follows, in that contests about kingdoms and the boundaries of kingdoms never come to an end with lapse of time.[xlvii] Such condition, again, not only tends to disturb the minds of many and to occasion wars, but it is also contrary to the common sense of nations.[xlviii]

[xlii] The word "infants" is marked inaudible in the original transcript. Kelsey concludes the passage "but not the right of the owner himself to use what he owns."
[xliii] *JBP*, 2.3.6.
[xliv] In original, not "who to capture"; "usucaption."
[xlv] In original, not "of course"; "effective force."
[xlvi] Kelsey here inserts "an."
[xlvii] "But if we admit" in the translation.
[xlviii] *JBP*, 2.4.1.

LS: What is the basis of[89] [this] prescription? It is not natural right, nor can it be municipal law, because municipal law does not extend beyond the individual political society.

Student: Convenience.

LS: Yes, but what kind of law? He does not draw the conclusion here, but I think it is clear: *ius gentium*. Because it is manifestly inconvenient if all these questions can be reopened indefinitely. But it is not natural right proper. Let us turn to paragraph 3.

Reader:

> What shall we say? Actions at law, which are dependent on intent, cannot indeed be inferred from a mental act alone, unless that act has been indicated by certain outward signs. For to assign a legal effect to mere acts of the mind is not consistent with human nature, which is able to recognize such acts only from outward signs. And for this reason purely mental acts are not subject to human law.
>
> Outward signs, however, do not indicate mental acts with mathematical certainty, but only with probability. For men can say something different from what they desire and feel, and can disguise their intentions by their actions. Nevertheless the nature of human society does not allow that no effect be given to mental acts which are sufficiently indicated. And so whatever has been sufficiently indicated is considered as true in respect to him who has indicated it. Thus, as regards words at any rate, the difficulty is solved.[xlix]

LS: This is one important reason why human things cannot be of mathematical certainty, because the questions arises: Did he intend it, or did he not? And we cannot look into his heart, to say nothing of other complications. We come back later on to the question of prescription.

Student: Doesn't the relationship of word and act here seem to reflect the remark of Locke, when he says that idolatry cannot be punished because you can't see people who are idolatrous?

LS: This question we will discuss in chapter 20 of the second book, the question on punishment. This in a way was generally admitted. This is not in itself an innovation. Idolatrous acts can of course be seen—whether you[90] [bend] your knee or not, everyone can see that. But the question is whether any such acts are punishable under natural law. This is the question. Or what is the precise point which you make?

Student: I thought that this reflected Locke.

LS: What passage is it?

[xlix] *JBP*, 2.4.3.

Student: "for this reason purely mental acts are not subject to human law,"[91] paragraph 3.

LS: But where does he speak of idolatry here? In other words, the thoughts as thoughts. But words are not mere[92] [thoughts]. In other words, who is punished? I mean the people are punished for idolatrous speeches or idolatrous deeds, which are clearly subject to human cognition—the thoughts as such are not subject. That is the difference. But we come to the question of idolatry later.

Now the case for prescription is stated in paragraph 8, the third section.

Reader:

> It is then, in the interest of human society, that governments be established on a sure basis beyond the hazard of dispute; and all implications which point in that direction ought to be looked upon with favor. For if Aratus of Sicyon thought it a hard thing that private possessions of fifty years' standing be taken away, how much more ought that saying of Augustus to be held in mind, that "He is a good man and a good citizen who does not wish the present condition of the state changed"; and who, as Alcibiades says in Thucydides, "will preserve the form of government which he received."
>
> The expression, "to maintain the present form of government," Isocrates used in the oration *Against Callimachus.* Thus also Cicero, in a speech to the people *Against Rullus*: "It is becoming for an advocate of quiet and harmony to defend the existing condition of the state"; and Livy says: "All the best citizens rejoice in the present state of government."[l]

LS: In other words, prescription justifies this most interesting case, and let us read the beginning of paragraph 9.

Reader:

> Perhaps without improbability it can be said that this adjustment is not based on presumption alone, but that, in accordance with the volitional law of nations, the provision was introduced that possession beyond the limits of memory, not interrupted or called in question by appeal to the courts, should absolutely transfer ownership. It is in fact credible that the nations agreed in this, since it was of the greatest importance for the preservation of the common peace.[li]

LS: In other words, he does not say quite clearly, but he almost says that prescription is based on the *ius gentium*. Never forget the dual meaning of *ius gentium*. That's a positive right, not natural right, but a positive right which is accepted by the whole human race, or at least by all civilized men. But positive, it is not by nature.

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[l] *JBP*, 2.4.8.3.
[li] *JBP*, 2.4.9.

In paragraph 10, in the third section, he makes it clear at the beginning of section 3, by implication, that natural law as such is not based on legal[93] [fictions], as civil law may very well be.[94] [Civil law] is nature and[95] [convention] lumped together, and therefore the element of fiction comes in. It may be[96] [complete] fiction, like for example that everyone not proven guilty is innocent, presumed to be innocent.[97] [Some] may very well be guilty, although not *proven* guilty.

Paragraph 12 I think we should read. No, that is too long. The key point is—the question which he discusses here is this: Does prescription deriving from civil law bind the gods, the *summa potestas*? The answer is no. Nor does prescription suffice as a title to rule. This is very strange, isn't it? Before he seems to have said something to this effect. I think we have to read that paragraph.

Reader:

> It is also worthwhile to investigate this question, whether a law dealing with ownership by usucaption or by prescription, and established by one who has sovereign power, can apply also to the right of sovereignty itself, and to the necessary parts of it which I have explained elsewhere.
>
> Not a few jurists, who treat of sovereignty in accordance with Roman municipal law, think that such a law does apply. But I think otherwise. For in order that anyone may be bound by a law, both power and intent, at least presumed, are requisite in the maker of the law. No one can bind himself after the manner of the law, that is, after the manner of a superior. Hence it is that the makers of laws have a right to change their own laws. Still, one can be bound by his own law, not directly but by implication; inasmuch as he is a member of the community, he is under an obligation imposed by natural fairness, which desires that the parts be adjusted in relation to the whole. Sacred history notes that such an observance was characteristic of Saul at the beginning of his reign. But here this is not in point, because we are considering the maker of laws not as a part of the community, but as the one in whom the power of the entire body resides. We are in fact treating of sovereignty as such.[lii]

LS: Go to the next paragraph, 12, section 2.

Reader:

> From these considerations it follows that the time defined by such a statute is not sufficient for acquiring sovereignty or a necessary part of it, if the natural implications which we mentioned above are lacking; that so great a length of time is not required if such implications are present within the time to a sufficient degree; and, lastly, a civil statute, which forbids that property be acquired within a fixed time, does not have anything to do with matters of sovereignty.

[lii] *JBP*, 2.4.12.1.

> Nevertheless, in a transfer of sovereignty, the people could express its will as to the manner and time at which the sovereignty might be lost by failure to exercise it. This expressed will would undoubtedly have to be followed, and could not be infringed upon even by a king possessed of sovereign power, because it applies not to the sovereignty itself, but to the manner of holding it. But of this distinction I have spoken elsewhere.[liii]

LS: The result of this discussion appears from paragraph 14, where he says it is not simply true that a people which lost its liberty may always reclaim it. In other words, there is a right of prescription without there being a constant return on it. Gronovius, this commentator, says in his note that the right of the European[98] [monarchs] stands enforced by prescription. In Europe, or whatever may be true in Asia, since their rule is based on prescription, they are bound by prescription and also regarding promises and so on. A prince may bind himself by law. In other words, the rule that he [who] makes the law can also unmake the law, and therefore[99] [is absolute], is not valid. Grotius has been misled by Bodin, the predecessor of Hobbes, in the doctrine of sovereignty.

Let us read the end of paragraph 15.

Reader: "These rights are not lost, except in consequence of a prohibition or restraint, and when obedience has been rendered thereto, with a sufficient indication of consent. Since this is in accord not only with municipal law, but also with natural reason, it will properly apply also in the case of men of the highest rank."[liv]

LS: In other words, surely princes are bound by[100] natural right; this traditional teaching is preserved by Grotius.

Is there any other point you would like to bring up?

Student: In what sense was Grotius misled[101] [by Bodin]?

LS: In denying that prescription binds[102] [sovereigns]. If the rule itself is based on prescription, then the princes are also bound, because they would destroy their own title. The strict doctrine of sovereignty means of course that—well, Bodin did not develop this, but Hobbes did. The sovereign is not bound by anything, not even by natural law, because the natural law needs interpretation in each case. For example, in the case of necessity, extreme necessity, all kinds of things can[103] [be justified], and under this the sovereign is not bound. It is prudent for the sovereign; he should give laws and should keep them as long as they are[104] [salutary], but he is the sole judge. The only thing you can say from the point of law is that he made the established law, and he can make laws, unmake laws, make exceptions to laws, as he sees fit. This is the only rule which is compatible, according to Hobbes, with the infinite variety of circumstances and with the infinitely dangerous character of international[105] [rivalry]. That is ultimately the point. The danger of the state of nature—and the[106] [relation] between states, according to

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[liii] *JBP*, 2.4.12.2.
[liv] *JBP*, 2.4.15.

Hobbes, is always the state of nature, because there is no common superior, no judge, no impartial judge, whom you can trust to make the fair decision and will not be swayed himself by his national interest. A judge owes his[107] [allegiance] also to his home country. There may be some men of unusual virtue who can disregard Swedes, or Dutch, or Poles or whatever it may be, but a state would never entrust its vital interests as they are now called to such[108] [judges], because there is a certain contradiction between vital interests and impartiality.

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[1] Deleted "what could."
[2] Deleted "it."
[3] Deleted "unknowable."
[4] Deleted "same as."
[5] Deleted "to."
[6] Deleted "these things."
[7] Deleted "many."
[8] Deleted "distinction."
[9] Deleted "deliverance."
[10] Deleted "[inaudible]."
[11] Deleted "[inaudible]."
[12] Deleted "but who did it before?"
[13] Deleted "restate."
[14] Deleted "was."
[15] Deleted "[inaudible]."
[16] Deleted "and not necessarily."
[17] Deleted "[inaudible]."
[18] Deleted "as."
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[20] Deleted "[inaudible]."
[21] Deleted "head."
[22] Deleted "[inaudible]."
[23] Deleted "the [inaudible]."
[24] Deleted "that."
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[26] Deleted "[inaudible]."
[27] Deleted "de [inaudible]."
[28] Deleted "at."
[29] Deleted "[inaudible]."
[30] Deleted "right."
[31] Deleted "or be it."
[32] Deleted "term."
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[34] Deleted "radical."
[35] Deleted "600."
[36] Deleted "[inaudible]."
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[45] Deleted "who."
[46] Deleted "you."

[47] Deleted “rather.”
[48] Deleted “[inaudible].”
[49] Deleted “[inaudible].”
[50] Deleted “political.”
[51] Deleted “[inaudible].”
[52] Deleted “[inaudible].”
[53] Deleted “[inaudible].”
[54] Deleted “people.”
[55] Deleted “devise.”
[56] Deleted “in.”
[57] Deleted “that.”
[58] Deleted “policy.”
[59] Deleted “of.”
[60] Deleted “what.”
[61] Deleted “[inaudible].”
[62] Deleted “Chapter” (Strauss established in Session Three that the major sub-sections of Chapters would be called “paragraphs,” but he temporarily lapses from that here).
[63] Deleted “chapter.”
[64] Deleted “[inaudible].”
[65] Deleted “there are.”
[66] Deleted “insufficient.”
[67] Deleted “[inaudible].”
[68] Deleted “too.”
[69] Deleted “[inaudible].”
[70] Deleted “as a good reason for.”
[71] Deleted “But.”
[72] Deleted “the futile [inaudible].”
[73] Deleted “compact.”
[74] Deleted “the [inaudible].”
[75] Deleted “buried.”
[76] Deleted “[inaudible].”
[77] Deleted “[inaudible].”
[78] Deleted “[inaudible].”
[79] Deleted “[inaudible].”
[80] Deleted “Reader: Finally, with the increase in the number of men as well as books. LS: From the beginning.”
[81] Deleted “[inaudible].”
[82] Deleted “[inaudible].”
[83] Deleted “[inaudible].”
[84] Deleted “[inaudible].”
[85] Deleted “*ille primebus status.*”
[86] Deleted “an.”
[87] Deleted “and.”
[88] Deleted “[inaudible].”
[89] Deleted “[inaudible].”
[90] Deleted “bow.”
[91] Deleted “Section 3.”
[92] Deleted “[inaudible].”
[93] Deleted “[inaudible].”
[94] Deleted “Imagine what.”
[95] Deleted “truth.”
[96] Deleted “[inaudible].” The meaning could also be something like “justifiable.”
[97] Deleted “but.”
[98] Deleted “[inaudible].”
[99] Deleted “[inaudible].”

[100] Deleted “the.”
[101] Deleted “[inaudible].”
[102] Deleted “[inaudible].”
[103] Deleted “[inaudible].”
[104] Deleted “solitary.”
[105] Deleted “livelihood.”
[106] Deleted “[inaudible].”
[107] Deleted “authority.”
[108] Deleted “[inaudible].”

Session 5: October 20, 1964

Leo Strauss: You said this is a book on public law, and you said there is a constant kind of transition from private law to public law.[i] Is that what you meant?

Student: Yes.

LS: In other words, the relation between ruler and ruled is understood in terms of the relation among the ruled. Lordship, dominion, means in latin "proprietorship."[ii] This is a very insufficient explanation, but linguistically *dominus* is the owner and at the same time the lord. In the feudal order of course[1] [there was a] complete coincidence between private and public and this carried over into modern times, but the great achievement of modern times is this strict separation between private and public, which in another way had existed in classical antiquity.

Now a few other points which you made. You quoted Rousseau's critique of Grotius, which is in many cases quite correct. Remember, I quoted another passage where he speaks about Grotius' argument regarding slavery.[iii] There is something to that, that Grotius defends all kinds of terrible[2] tyranny. But we must not forget, and we will see it very clearly when we come towards the end of the second book, that Grotius was a very humane man, but his humanity was tempered by his sense of what was feasible. Now whether this means feasible now, 1625, or *ever*, that has something to do with the last question: Does he teach a truly natural law, universally valid at all times and places, or is this presentation at least[3] modified by the present situation?

You rightly pointed to his hesitations regarding incest. We will come to that.

One of your best remarks was what you said about the difference between Grotius and Aristotle regarding the three elements of the household—that parent-children, husband-wife, [and] master-slave are parts of the household for Aristotle, whereas Grotius makes a distinction in fact, at least, that the master-slave relation does not have the same character as the two other relations. That is, I think, very true.

Now regarding the children and father relation, what is the situation between grown-up children—what is the legal situation for grown-up children, who are already married?

Student: He says that they are independent in all things, but still hold filial affection and honor to their parents.

LS: I am sure there are some of you here who have read Locke's discussion of this subject. Now what is the difference between Locke and Grotius?

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[i] The session began with the reading of a student's paper. The reading was not recorded.
[ii] The Latin word is *dominium*.
[iii] Session 3.

Student: Doesn't he say that[4] [children had] obligation only as long as the parents provided for[5] [them]?

LS: Obedience proper is not due, but honor is. To that extent they agree.

Student: There is a *quid pro quo* relationship. The son is constantly aware of how much his father gives to him, and later on that will determine to what extent he will return honor.

LS: More neatly, perhaps: the appearance of grown-up children's obeying their parents, as distinct from honoring them, is due to their expectation of the inheritance.[iv] This cynical thought is wholly absent from Grotius.

Student: I was going to say that Locke thinks that the child is not prepared with any feeling of[6] [affection]. He talks about filial affection on the part of the child which is not a natural thing, but on the part of the parents it is.

LS: I do not remember Locke's chapter well enough, but he does not say a word about filial affection? I do know that the emphasis is on honoring, and in Grotius it is at least equal. This may very well be an important point, and what will be the reason given by Locke for being silent or reticent about affection? That's also a long-winded question.

Can affection be commanded? Honoring, at least in the[7] [external] sense, can be commanded. Never contradict your father, always rise when he enters, and this kind of thing, that can easily be commanded. Strict honoring in the full sense was also not simply subject to commandment. This might be the reason, and Grotius would not surely[8] [counter] that.

Now before we turn to our chapter, I would like to begin again with a general reflection, lest we lose ourselves in forgotten things of the seventeenth century. Now when we read such a text, we are guided by a certain question, or we are looking at it from a certain point of view, and this point of view, as I have said more than once, is of the quarrel between the ancients and the moderns. But is this point of view necessary? In other words, are there not *n* points of view, each of which is as good as ours, and so that our approach is fundamentally arbitrary?

You know perhaps of that school of historians represented by the late Carl Becker, which is summarized in the phrase, everybody is his own historian, or something like that,[v] meaning every historian or every group of historians approaches things from a different point of view, and this cannot in any way be changed, *i.e.*, there is a fundamental subjectivity to all history.

[iv] Locke, *Second Treatise of Government*, §§ 72-3.

[v] Carl Becker entitled his 1931 inaugural address as President of the American Historical Association, "Everyman His Own Historian."

Now if we start from the present situation in political science, we are confronted with this massive question at the very beginning. Even literally, when you enter a political science department in which political philosophy happens to be taught, which is not generally the case, and then the question arises: Is there or is there not political philosophy in[9] [contradistinction] to mere political science? Now this question presupposes that there is a distinction of political philosophy and political science, which in its turn rests on the distinction of philosophy and science. This distinction with which you all are familiar is the outcome of the great revolution of the seventeenth century; it was not meant by these great men, Galileo or Newton, but [was] the outcome of that. This outcome became visible only in the late eighteenth century. Now to understand this distinction, which is underlined in all orientations today between philosophy and science, [and] a distinction which may or may not justify the rejection of political philosophy, we must know the original state of things. And this question itself, which is so inevitable for us and absolutely necessary as the first step, forces us on reflection to understand the original unity of political philosophy and political science, and what it means that they could be distinguished from each other, separated from one another, and ultimately opposed to one another. But that is one special form of the quarrel between the ancients and the moderns.

I would like to say that my own[10] [orientation], when I was younger, toward this quarrel of the ancients and the moderns was somewhat different. I was struck by the fact that since the nineteenth century, history—historical studies—has acquired a philosophical importance, an importance for men's overall understanding which they never had in the past: a concern with historical studies which was quite notable. This is the so-called emergence of the historical consciousness, as if it were a dimension of reality which formerly had not been known or properly understood. We have to compare it with another thing, as some people believe that there is a whole dimension of reality which was unknown until Freud discovered it: the unconscious. Whatever may be true of Freud, at the first glance it seems to be quite clear that the historical dimension, as we will call it, was not known[11] [before the nineteenth century].

Now what does this historical study mean, this passionate and fundamentally philosophically inspired historical study?

As one of the greatest historians of the nineteenth century put it, Ranke,[vi] we want to understand the past as it really has been; *i.e*., not from the point of view of the present. When we study, say, the Crusades, we do not look at it as Voltaire or Hume looked at them as crazy consequences of superstition, but we try to understand it as the Crusaders understood it or [as] the best contemporaries understood it. We must understand the past as it was understood by the past. In other words, this modern historical consciousness claims to be both philosophically relevant, and also that it is possible to understand the past as it had understood itself. It is possible. The latter would have been granted by the way by earlier thinkers as a matter of course; they simply were not sufficiently interested in that. And yet this historical objectivity is not only not achieved in fact, but the historical consciousness as it developed denies eventually that it is meaningful to aspire

[vi] Leopold von Ranke (1795-1886), for whom history was the search for "how it really was" (*wie es eigentlich gewesen*).

toward it—you cannot possibly understand the past as it understood itself. You can only understand it within the framework of your own horizon or your own point of view.

So this is the difficulty with which one becomes confronted in the present-day situation. On the one hand, [there is] the absolute necessity of historical studies, and not merely for antiquarian reasons. We all sense that necessity, even if we cannot explain it. But it is simply[12] [held] that if someone talks today about, say,[13] any subject in political philosophy, without any historical basis, that is shallow. God knows why, but it is. So historical studies now are [14][considered essential], whereas Aristotle or Thomas Aquinas didn't need any historical studies. When Thomas Aquinas studied Aristotle, that was not an historical study. Aristotle lived 1500 or so years earlier,[15] [but] that[16] [was irrelevant]. He was in the decisive respect a contemporary.

Now for us this is, to begin with, wholly impossible. We must engage in historical studies as such, and yet we do not see how we can do[17] [it] with that objectivity which historians as historians must claim. This is a very obvious difficulty today. This led me as an individual to wonder about the whole question of the historical consciousness as another phenomenon, and another question more specifically: Is [not] the notion of historical objectivity or the possibility of historical objectivity much more intelligible on the classical basis than on the modern basis? [That is], however little the classics and the medieval thinkers may have cared for each other, were they not by their principles better able to study history, if they had gone into it, than we who can read these famous masterpieces of historical works and this kind of thing which did not exist in former times?

Student: Why [inaudible] Aquinas make Aristotle a contemporary by making him over completely?

LS: Not quite: he corrects him. Aquinas, being a Christian, cannot accept everything Aristotle says. For Thomas Aquinas it is absolutely unnecessary to see Aristotle as a member of the Greek culture. Aristotle was a pagan, *i.e*., he believed in false gods. That's quite important, but within these limits, he did a terrific job. After all, what did Thomas Aquinas know of Greek culture? Very little. He did not know Homer, or the tragedies, or to a certain extent the comedies. He didn't know Herodotus, Thucydides. So he knew Aristotle, and Plato's[18] [Timaeus] of course, and perhaps some other titles of Plato, and the late commentaries[19] [on] Aristotle that were [by] very scholastic people, and not beautiful paeans to Greek culture.

Whereas today—look at this little thing. I thought of it on the occasion of Machiavelli in particular. I have not seen a contemporary study, say, in the last one hundred years, on Machiavelli in which[20] much is [not] made of the fact that Machiavelli is a member, if I may use this term, of the Renaissance. If you don't know that, you won't understand Machiavelli. I contend that this is a very bad position. For all we know, Machiavelli is not a member of the Renaissance. That he was a contemporary of it doesn't prove that he was of it. That would have to be established by Machiavelli himself—or, to state it in methodological terms, our concept of [the] Renaissance is derived from a number of

things, one of them being Machiavelli. Now then it becomes hardened into a being of its own and is used as the key to the understanding of Machiavelli, whereas it is not derived merely from Machiavelli and therefore we do not know where it belongs. I contend[21] [on] this point [that] there is one allusion [in Machiavelli] to Renaissance, in the sense of re-birth, or rather the re-discovery of ancient statues, and also the recalling of some ancient books, which[22] [have] been unknown for some time.[vii] Prior to investigation, we do not know in what sense a man is a member, or belongs to his age, before we have studied it. In some externals it may be true, but his Italian is different from the Italian written in the fifteenth century or seventeenth century. But what do we say about a man if we say, well, he wears clothes like an American student in 1964 wears them. You don't even know whether he wears a tie or not a tie, because there is a variety; but even if you knew there was a simple fashion, what would you know about that individual? Nothing. He would be entirely dressed like a 1964 American, and he might be at home elsewhere. The belief that a man is radically a son of his age is a dubious assumption.

Student: What about the assumption that most men are?

LS: Yes, most men are. But then you come into greater difficulties, because strange as it may sound, it is easier in good method to study a great thinker than a movement because then you have to use a kind of statistical average, and how do you do that? The Puritans—Puritanism—how many kinds of Puritans were there? What is the normal Puritanism? How do you establish that? But if it is a question of John Milton, that's an answer to your question. So while it is quite easy, if you don't think much, to study mass movements, in a solid way it is much easier, although in another way[23] [difficult], to understand a great man. Now that is only part of our study.

Now I want to make one other provisional remark so that we get the proper perspective. You remember Grotius' notion of right strictly understood as distinguished from right in a broad sense. This, we have seen, is based on the distinction, which he knew from Cicero, between the things which are by nature first, which every baby has at the moment of his birth, and the end of man, which becomes clear to man only when it is fully developed, and[24] by no means [from] the origin. This distinction is very enlightening and very important. In order to understand it, I would like to read you a few passages from a [follower][viii] of Machiavelli, and that is Lord Chancellor Francis Bacon. I take his most accessible work, *The Advancement of Learning*, which all of you could buy because it is available in[25] [a Modern] Library edition, and it is also written in English, so there is no difficulty regarding language.

When he begins to speak about moral and political science, he says:

> In the handling of this science, those which have written seem to have done as if a man, that professed to teach to write, did only exhibit fair copies of alphabets and letters joined, without any precepts or directions

[vii] Machiavelli, preface to "First Book" in *Discourses on Livy*, trans. Harvey C. Mansfield and Nathan Tarcov (Chicago: University of Chicago Press, 1996), 5-6.
[viii] In the original transcript: "contemporary"

> for the carriage of the hand and framing of the letters.[ix] So have they made good and fair exemplars and copies, carrying the draughts and portraitures of *good, virtue, duty, felicity;*[x] propounding them well described as the true objects and scopes of man's will and desires.[xi] But how to attain these excellent marks, and how to frame and subdue the will of man to become true and conformable to these pursuits, they pass it over altogether, or slightly and unprofitably.[xii]

Is this point clear? They (the ancient philosophers) gave us the morals of virtue, justice, courage, felicity, or whatever you have, but they did not show us the way to it. They showed us the norm but did not teach us how to actualize the norm, how to practice it, how to apply it. Truth[26] [may be fair], but can you expect fairness in such a situation?

Student: But I am thinking—just read the *Republic*, or—

LS: Sure.[xiii] You are quite right, and it is ultimately[27] [incorrect], but in fairness to Bacon, you must not forget this. Something was stirring, and this new novel thing, good or bad, was simply suppressed by the authorities. In Oxford and Cambridge, the people who were occupying the chair would not listen to such a man who was, as some people said, a man bribed and corrupt. You all know his life story.

But this is at least the first[28] [criticism]. The standards, they were well stated by the classics, but not more. Now let us read a few more passages. "[T]he main and primitive division of moral knowledge seems to be into the exemplar or black form of good,[xiv] and the regiment or culture of the mind: the one describing the nature of good, the other prescribing how to subdue, how to apply, and how to accommodate the will of men thereunto."[xv] In other words, the one thing was done very[29] [well] by Plato and Aristotle; the other very poorly, if at all. Again, he repeats it: "If before they had come to the popular and received notions of virtue and vice, pleasure and pain, and the rest, they had stayed a little longer upon the inquiry concerning the roots of good and evil, and the strength of those roots, they had given, in my opinion, a great light to that which followed."[xvi]

[ix] In original, not "without any precepts or directions"; "without giving any precepts or directions."
[x] The words "draughts and portraitures" are marked inaudible in the transcript.
[xi] The words "well described" are marked inaudible in the original transcript.
[xii] Bacon, *Advancement of Learning*, ed. G. W. Kitchin (Philadelphia: Paul Dry Books, 2001), 2.20.1.
[xiii] The student presumably means to raise the objection that the ancients did concern themselves with how to cultivate virtue in the soul, contrary to Bacon's assertion.
[xiv] In original, not "black form of good"; "platform of good" in Bacon.
[xv] Bacon has "the other prescribing rules how to subdue, apply, and accommodate the will of man thereunto." *Advancement*, 2.20.3.
[xvi] In original, not "the strength of those roots"; "the strings of those roots." Bacon, *Advancement*, 2.20.6.

Do you see here a change? First we have the primary thing, the[30] [moral], and the secondary[31] but very important [thing] is how to apply it. Now he calls this primary investigation which is missing, the investigation[32] [neglected by] Aristotle, the reflection on the roots of evil, *i.e*., the roots. The[33] platform is not truly the primary; there is something more primary, which Aristotle neglected. We must see. You see it is a bit more complicated.

Now I read you a few more passages:

> There belongeth further to the handling of this part of moral sciences,[xvii] touching the duties of professions and vocations, a relative or opposite, touching the frauds, courtiers , impostures, and vices of every profession"[xviii]—which has not been sufficiently handled—"The managing of this argument with integrity and truth"—meaning the study of vice not by vicious men, but with integrity and truth (look at present-day political scientists, studying political corruption, not as politically corrupt men, but as opposed to it)—"which I know as deficient,[xix] seems to be one of the best fortifications for honesty and virtue that can be planted."[xx]

In other words, it is not sufficient to know virtue and honesty, the norm; you have also to fortify it, and therefore you have to know vice. How can you defend virtue against vice if you do not know your enemy? This has been neglected. "So that we are much beholden to Machiavelli and others, that write what men do, and not what they ought to do."

Plato and Aristotle made[34] [many wonderful speeches concerning] what men ought to do, but they did not pay attention to what men do do, not sufficiently.

> For it is not possible to join certainty and wisdom with columbine innocency,[xxi] except men know exactly all the conditions of the serpent: his baseness and going upon his belly,[xxii] his volubility and duplicity, his envy, and sting, and the rest;[xxiii] that is, all forms and natures of evil: for without this, virtue lies open and unfenced. Nay, an honest man can do no good upon those that are wicked to reclaim them, without the help and knowledge of evil.[xxiv]

[xvii] The words "of moral sciences" are a restatement and are not in Bacon.
[xviii] In original, not "courtiers"; "cautels."
[xix] In original, not "which I know"; "which I note."
[xx] In original, not "seems to be"; "seemeth to me to be."
[xxi] In original, not "certainty and wisdom"; "serpentine wisdom."
[xxii] In the original transcript "baseness" is marked inaudible.
[xxiii] In original, not "duplicity"; "lubricity." The words "envy, and sting" are marked inaudible in the original transcript.
[xxiv] In original, not "the help and knowledge of evil"; "the help of the knowledge of evil." Bacon, *Advancement*, 2.21.9.

This is the fundamental defect of classical thought, a defect which was remedied above all by Machiavelli: the knowledge of evil. Then a little bit later he quotes a passage where Aristotle himself says that it is necessary to speak about virtue, both what it is and how it is brought about. There is of course then the question of application. So that he knows Aristotle; he quotes him[35] [directly]: "In such full words and in such iteration does he inculcate this part."[xxv]

What's wrong then with Aristotle? I read to you only one more passage, and then I am through. He notes:

> and here I find strange, as before, that Aristotle should have written divers volumes of ethics, and never handled the affections[xxvi] [**LS**: the passions] which is a principal subject thereof,[xxvii] and yet in his *Rhetoric,* where they are considered collaterally, and in the second degree,[xxviii] he finds a place for them, and handles them well for the quantity; but where their true place is[xxix] [**LS**: namely in the *Ethics*] he preteritted them[xxx] [**LS**: he omits them].[xxxi]

So in other words, the passions—and this is a key point—have not been properly treated by the classics, but the poets and writers of history are the best doctors of this knowledge. By doctors he does not mean here of course physicians, but knowers.

> We may find painted forth with great life, how affections are kindled and incited; and how pacified and refrained; and how again contained from act and further degree; how they disclose themselves; how they work; how they vary; how they gather and fortify; how they are enwrapped one within another; and how they do fight and encounter one with another[xxxii] amongst the which this last is of special use in moral and civil matters [**LS**: how they fight each other] how, I say, to set affection against affection, and to master one by another [**LS**: "affection" means passion] even as we use to hunt beast with beast, and fly bird with bird, which otherwise percase we should not so easily recover: upon which foundation is erected that excellent use of reward and punishment, whereby civil

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[xxv] The mention of Aristotle, and the passage Strauss quotes, are in Bacon, *Advancement*, 2.22.1.
[xxvi] In original, not "and here I find strange"; "and here again I find strange."
[xxvii] In original, not "a principal subject thereof"; "the principal subject thereof."
[xxviii] In original, not "considered collaterally, and in the second degree"; "considered collaterally, and in a second degree."
[xxix] The Kitchin edition of Bacon has "he findeth place for them, and handleth them well for the quantity."
[xxx] In original, not "preteritted"; "pretermitteth."
[xxxi] Bacon, *Advancement*, 2.22.6.
[xxxii] Bacon here inserts "and other the like particularities."

> states consist: employing the predominant affections of fear and hope, for the suppressing and bridling of the rest.[xxxiii]

One would have to read the whole passage, but gradually this picture emerges. There are, let us say, the ends, the norms. They were well known. But what was not known was the most important means of achieving these things, namely, by virtue of a manipulation of the passions. Machiavelli is a supplement to Aristotle, but we must[36] [recognize we are] immediately in a wholly un-Aristotleian spirit. He may be said to have discovered or put together the art of *engineering* virtue. But virtue cannot be engineered, therefore the end can no longer be the same. This is a very simple point, and with my beautiful geometrical method, I will demonstrate. [LS writes on the blackboard] Here we have the norm or the platform, and here we have the human beings who are to be molded according to it; as simple as that. The ancients did not pay sufficient attention to this, but Machiavelli did. He looked at men as they are. But Bacon, who is not so lasting a man as Machiavelli—how could he be, he was Lord Chancellor of England and Machiavelli was only[37] [a Florentine]. You know that's a famous difference between them.[xxxiv]

So what have we to do? We find out an art of how to engineer it, so that men who are so low will reach this. But this change—that the moral appeal proper is replaced by moral engineering changes this as long as virtue is understood strictly as virtue. You can't think of[38] [it as mere] engineering[39]—we get in fact a new ideal, a lower ideal. That is what Bacon is trying to do, which would appear if you were to read the whole thing, and not only Bacon but quite a few other men.

Now Machiavelli himself had rejected this end, the platform, and tried to find such a realistic end through the study of the passions, and to find this realistic end as it were vouched for by the passions. This is what he calls the common good, but which is really only the selfish interest of any particular society.

Now let us compare Grotius. Grotius is concerned, in a way which is wholly un-Machiavellian, with norms. To that extent he fully agrees with Aristotle, but he is concerned with this relative norm[40] [ranking]. [LS writes on the blackboard] Grotius is concerned with right strictly understood. That is the key point: that which is by its nature to be brought about by coercion, whereas another part cannot be coerced. But that is the first point.

The Grotian thought, which is not fully developed by Grotius, as we have seen, would then eventually lead to a new moral science based on only a low or solid ground—the phrase "low but solid" I learned from Churchill, who has something to do with this tradition. In other words, self-preservation—you remember this is the key point among these *prima naturae*, these first concerns by nature which men have.[xxxv] You have a new

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[xxxiii] Bacon, *Advancement*, 2.22.6. Strauss translates the "*praemium* and *poena*" of the original "reward and punishment."

[xxxiv] Machiavelli served as foreign secretary to the Florentine Republic. Strauss may have mentioned this, but it was not transcribed.

[xxxv] See *JBP*, 1.2.1.1.

science, a science which didn't exist before, the typically modern science which is concerned with self-preservation, but of course with not just mere self-preservation on the lowest level with living from acorns and this kind of thing, but to use this beautiful phrase of John Locke, "comfortable self-preservation."[xxxvi]

The thing which is called "economics" is in its origin, of course, a most important art of this science of "comfortable self-preservation." Therefore economics in the modern sense plays practically no role in classical political philosophy and a crucial role in all modern political philosophy. Now in a later stage (and again I describe only a small part of the development), now if you have this new science—you see Grotius has no Machiavellian intentions, that is quite obvious. But there is a strange kinship between this intent to separate out the lowest part of the norms, and Machiavelli starting from how men are as distinguished from how men should be. The genius who combined these two things was Hobbes. In Hobbes you have a natural law teaching, something wholly alien to Machiavelli but akin to Grotius, which is based entirely and much more radically than in Grotius, [and] which limits itself entirely to what Grotius calls[41] ["right strictly understood"]. This is one of the basic strata of modern thought.

Now I make a big jump. This moral science, this new moral science limited to the *prima naturae* and entirely concerned with them, was developed in an ever-more sophisticated manner. There always were some troubles and new changes were necessary, and that is in a way the history of modern political theory. At a certain stage, the professors of that science, professors not in the academic[42] [sense], but in the administrative[43] [sense], became aware of the fact that this science, which is much more amenable to scientific treatment than the old form was, that this was based on an arbitrary abstraction[44] [from] the highest sphere. One stage which modern moral science had achieved around 1800 was utilitarianism. This utilitarianism is still the basis of present day social science. There is a French[45] [influence here].[xxxvii] Scratch the average social scientist and you will find a utilitarian.

Now to repeat these last points: At a certain moment some thoughtful social scientists became aware that the disregard of this higher level is an arbitrary abstraction, which may be quite useful to bringing out some useful implications of this lower sphere understood as[46] if it were self-sufficient or independent. This is, I believe, the first [root] of the fact-value distinction. It was simply declared that the higher considerations are not excluded. You may very well have them, but we must try to have our social science proper independent of whether you want only to convince yourself of the "low but solid," or whether you want to take a broad view. Social science is neutral in this matter; whether that is a feasible way out, that is our question.

But there is a practical question for which I read to you Bacon, and that is simply this: That with all due regard for Grotius, there is no comparison with him and Bacon if we want to understand[47] the character of that great revolution which has taken place. Grotius

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[xxxvi] Locke, *First Treatise of Government*, § 87.

[xxxvii] A possible reference to Quetelet and Comte, who were mentioned by Strauss in session 4.

is much too undecided in that great movement to be a man of the same league as Bacon. Nevertheless, we can learn quite a few things from him.

Student: I was wondering if it were not true that the importance of Grotius lies more in his attempt to delimit or systematize prudence, rather than in his ignoring the higher . . . .

LS: What do you mean by prudence? That is a dangerous word. Do you use prudence in the colloquial sense?

Student: Practical wisdom.

LS: But practical wisdom also can have the same ambiguities. Meaning what is now called the existential in contradistinction to the moral?

Student: The art of the statesman.

LS: But that all depends. What do you mean by a statesman?

Student: The practicing statesman.

LS: Which? The Machiavellian or the other? The Machiavellian statesman has a different understanding of prudence. You see, Aristotle makes the distinction between cleverness and prudence, and prudence is not possible without moral virtue, whereas cleverness obviously is. Now I do not know which prudence you mean?

Student: My other point was that it seems to me in writing down, in codifying at least one part of prudence, Grotius delimits the sphere of the statesman, that is, he so to speak eliminates the necessity for the statesman's prudence.

LS: That is not true.

Student: That's my question.

LS: That is not true. He explicitly distinguishes, and we will come to that in later reading, between law and politics. The sphere of prudence is the sphere of politics. He is concerned chiefly with law, so the question is not the substitution of expediency for justice. No. But of a narrower notion of justice for a broad notion. That is the point.

But I must remind you, my statement was qualified quite a bit. There is a certain kinship between what Machiavelli has done and what Bacon has taken over to some extent, and what Grotius has done. What they do in the sphere of politics, let me say for convenience's sake, Grotius is trying to do in the sphere of law: concentration on the lower. And when these two things came together, the consideration of the lower in politics with the consideration of the lower in law, then we have this beautiful Hobbean synthesis which eventually itself had infinite consequences. But everything came clear the moment Hobbes[48] [put into a plan] what seemed to be like a kind of groping before. I

believe that everyone who has ever read Hobbes must get this impression, that this you understand, whereas in Bacon, or Grotius, even in Machiavelli, what they are after is much more difficult to see at first reading. In Hobbes, everyone can see.

Student: Is it part of your intention to get back to a study of the higher level, the highest level abstraction, by going into the early writings?

LS: Abstraction is truly a very bad word for what I mean.

Student: I'm talking about your high level . . . .

LS: But that does not mean it is more abstract. What is abstract, say in friendship, benevolence, or what have you, in contradistinction to strictly, narrowly conceived legal obligation? Abstract is the wrong word.

What happened in modern times is this, that in the first stage, characterized by Hobbes above all, there is an attempt to achieve a clarity and a convenient thing, [which in reality is] never achieved by disregarding the higher reaches. Now when the impossibility of this, the inadequacy of this was seen, the attempt was made to restore the higher reaches which Hobbes and Locke and even Rousseau had disregarded, and the question is then—but this new attempt, above all by Kant, was made on a Hobbean basis, and that is truly the question, whether this modern attempt to have a high level moral teaching is equal in solidity and evidence to the Platonic-Aristotelian teaching. That is ultimately for me[49] [the question]. I believe that they are [not][50] [solid], but that is a long question.

Now chapter 5, where we started today, is entitled "On the Original Acquisition of Right"[xxxviii]—"original" in contradistinction to derivative, of course. Hitherto Grotius had dealt with the original acquisition of rights[51] [to] things, property, now with the original acquisition of the right to persons. Persons cannot be owned in the way in which things can be owned. The original acquisition of things is possible now only by occupation. That is original because it is not based on any law or any other human arrangement, and this is manifestly not applicable to persons. You cannot acquire a right to a person by occupying it. Right of persons is originally acquired by generation, by consent, and by crime.

First, he discusses the right acquired by generation. Let us look at the end of paragraph two.

Reader:

> Nevertheless, in this period also a son or a daughter, according to universal customary law, is capable of ownership of property, though the exercise of the right is hindered on account of the imperfection of judgment as mentioned.[xxxix] As Plutarch said to children, they have the right "to possess," but not "to use."[xl] Wherefore it is not due to natural

[xxxviii] Book 2, chapter 5, "On the Original Acquisition of Rights over Persons."
[xxxix] In original, not "as mentioned"; "which I have mentioned."
[xl] "As Plutarch says of children" is the translated text.

> right that all the possessions of children are acquired by their parents, but to the laws of the certain people, which also in this manner distinguish the father from the mother, sons not of age from those that are of age, and illegitimate children from legitimate.[xli] But nature ignores these distinctions, except as regards that supremacy of sex which I have mentioned, in case of conflict of the parents in regarding[xlii]—

LS: In other words, that sons have a greater right than daughters, that is natural. But this difference between legitimate and illegitimate children is not known to nature. It is interesting: "natural" children are illegitimate children. This reminds us of the[52] original meaning of natural as opposed to law or convention. I think that is the only immediately available trace of the distinction in present-day usage.

Is then matrimony not an institution of natural right? If matrimony is an institution of natural right, then it would follow that children born out of wedlock do not have the same status as children born in wedlock. You might see how this happens.

A father has a natural right to sell his children if he cannot feed them. This is admitted, as Grotius surmises, by the Hebrews. Gronovius thinks that the passage which Grotius has in mind, Exodus 21:7,[53] hardly bears out what Grotius says. The Roman paternal power, power of the father, which included the right to sell children and of course the right of life and death[54] [over] children, is called tyrannical by Grotius. Let us read the last paragraph of paragraph seven.

Reader: "A similar right of the father among the Persians Aristotle indicts as tyrannical. These laws we report for this reason that we may distinguish accurately between municipal law and the law of nature."[xliii]

LS: Now what does this mean? The law of life and death[55] is not natural right. I mean that the father or the parents may kill their children[56] [by right], but that they may sell them, if it is the only way in which they can survive, that's another matter.

Now he turns then to the right in persons which is acquired by consent, and this can be either from association—most natural in the form of matrimony—and from subjection. So matrimony is not in that sense natural, that it does not require consent, whereas obviously in the case of children, no consent is possible due to their situation. Mrs. X is the wife of X,[57] [which supposes] her previous consent, and is therefore not simply natural. Now the nature of the matrimonial relation, that is discussed in paragraph eight. Let us read the second[58] [section].

[xli] In original, not "the laws of the certain people"; "the laws of certain people."
[xlii] In original, not "the parents in regarding"; "the parents regarding the exercise of parental rights." Grotius, *Law*, 2.5.2.2.
[xliii] *JBP*, 2.5.7.

Reader: "Marriage, then, according to the law of nature we consider such a cohabitation of a man with a woman[xliv] that it places the woman under the eye of the man, and under his guardianship."

LS: Quasi-guardianship; quasi under his eyes, because that is not true at every moment.

Reader: "Such a union it is in fact possible to see even in some kinds of dumb animals. But in the case of man, as an animate being endowed with reason, there is added to this the vow by which the woman binds herself to the man."[xlv]

LS: He doesn't speak now of the other side of that vow. In other words, he officially doesn't clear up whether the distinction between natural and legitimate children is by nature, because after all if someone lives with a woman, concubinage, provided that this woman gives that faith or vow, then it is matrimony in the sense of natural right, and there is no reason why he could not have the same arrangements, if I may say so, in two different towns. I mean if the means of communication are sufficiently easy.

He omits at the beginning of paragraph 9 . . . .

Reader: "Nature does not seem to require anything more in order to constitute a marriage, nor indeed does the divine law seem to have demanded anything further before the spread of the Gospel."[xlvi]

LS: In other words, in the Old Testament that was all right, and he gives some well-known examples from the Old Testament. So the strict notion of marriage is Christian and cannot be traced to natural right. Now what is the most striking thing in Grotius' definition of marriage, of the husband-wife relation, even compared with such a pagan as Aristotle? It is only cohabitation. What are the other things which are thought to be essential enemies of marriage?

But the ordinary thing which was always understood as a part of the marriage relation is the procreation of children and the upbringing of children. This here Grotius seems to disregard. My commentator[xlvii] says faith is added to it, or the vow. He tacitly mentions faith, and indicates that faith is not by nature but by institution, whatever the truth of it may be.

Now the extreme case of this line of reasoning which Grotius starts here, disregarding procreation and upbringing of children, is Kant's definition of marriage, which is on the face of it very coarse. But Kant was one of the most decent men that ever were and his coarseness has a very interesting reason. He says marriage is a contract between two persons of different sex for the mutual use of their sexual organs. That, some people say,

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[xliv] The tape was changed at this point. Absent from the original transcript are the words "law of nature we consider such a cohabitation of a man with a woman."
[xlv] *JBP*, 2.5.8.2.
[xlvi] *JBP*, 2.5.9.1.
[xlvii] Presumably Gronovius.

proves that Kant was a bachelor in the strictest sense of the word and had no notion of the mechanics, if I may say so, but this I think is unnatural. What Kant had in mind was something very serious. If you make the procreation and upbringing of children a part and even the highest part of the marriage relation, what happens to childless[59] marriages? That is the great difficulty. For the older thinkers, it was perfectly clear that it is in a sense a defective marriage—but not legally defective, it is only a match which does not fulfill quite the function of marriage. Since privations were provided for by the Aristotelian doctrine, there was no difficulty because there were other kinds of [privations], for example, a blind man is a defective man regarding sight, but is of course a human being otherwise, and many other things.

But Kant wants to have in the spirit of this new modern science a universally valid rule, without any exceptions, and then he has to define marriage in such a way that the difference between childless marriages and marriage with children would be irrelevant. In addition, there were at that time among the stricter Protestants the so-called[60] [spiritual marriages], that man married with the understanding that there would be no sexual relations. This of course also did not agree with Kant's moral tastes somehow, and therefore he put the emphasis on the mutual use . . . .

But Grotius prepares this in a way by putting the emphasis entirely on the cohabitation in the literal sense, living together. In paragraph 9 it is suggested that neither polygamy nor divorce is against natural right. It is interesting not only that this is his teaching, but also that he does not emphasize that. This is something unpleasant and shocking, and he simply makes it clear by saying that according to the divine laws of the New Testament, polygamy and divorce are forbidden but since this is due only to the divine law, it is not due to natural law.

Let us read in paragraph 9, section 2, the second[61] [subdivision].

Reader:

> But the law of Christ has brought marriage between Christians, as it has other matters, to a higher norm of perfection, in that both the one who divorces the woman that is not an adulteress, and the one who marries a divorced woman, are pronounced guilty of adultery.[xlviii]

LS: Begin with the first sentence of section two.

Reader:

> Furthermore, the method is prescribed for one who wishes to divorce a wife, and no one is hindered from marrying a divorced woman except the one who divorced her, and the priest. Nevertheless liberty of passing to another husband ought to be so restricted by the law of nature that confusion of offspring may not arise.[xlix]

[xlviii] In original, not "divorces the woman"; "divorces a woman."

[xlix] In original, not "liberty of passing to another husband"; "this liberty of passing to another husband."

LS: In other words, this is a concern of natural right, because the confusion of offspring would be a confusion regarding everything, especially regarding property. Read on.

Reader:

> Hence arises the question of pontifical law in Tacitus,[l] "whether a woman after conception, but before the birth of the child, can lawfully marry." Among the Jews it is ordered that three months intervene between the two marriages.[li]
>
> But the law of Christ has brought marriage between Christians, as it has other matters, to a higher norm of perfection, in that both the one who divorces the woman[lii] is not an adulteress, and the one who marries the divorced woman are pronounced guilty of adultery.[liii]

LS: Go on.

Reader:

> Further, all, the apostle and interpreter of the law, gives not only to the husband as much right over the person of the wife as is found also in the state of nature (says Artemidorus: "The one joined to a woman by the laws of marriage has complete mastery of her person"), but also equal right to the wife in turn over the person of the husband.[liv]

LS: So that is a specifically Christian provision, not a natural law provision. The natural law provision is strictly pro-male because of the greater excellence of the[62] [male] sex. That is the argument. But I would like to point out that the term "in the natural state" occurs here, one of the few places. "In the natural state" here means the pre-Christian state, and has nothing to do with the Hobbean view. The translation of the quotation of Artemidorus is not quite correct, because he speaks according to the law of Aphrodite. How does the English translator translate it?

Reader: "By the laws of marriage."

LS: That, of course, runs to Grotius' Latin translation. What it means in Greek is quite interesting, because Aphrodite after all is not the goddess of marriage. No one could possibly say that. That is quite interesting.

Now in the next section Grotius defends his view by suggesting that he states the right of nature in the strict and narrower sense, as distinguished from the right of nature in the full sense, which is oriented by the full end or *telos* of man. He gives some proof of it by the fact that the New Testament view is that of Euripides, for example. Grotius was a great

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[l] In original, not "the question"; "that question."
[li] In original, not "can lawfully marry"; "might lawfully marry."
[lii] Kelsey here inserts "that."
[liii] In original, not "the woman is not an adulteress"; "a woman that is not an adulteress."
[liv] In original, not "all, the apostle"; "Paul, the apostle." *JBP*, 2.5.9.2.

philologist, as you can see by the remark he makes in[63] [section] 3, "so also when God says"—about the middle of the section.

Reader: "Then thus when God said to Adam, through Moses, that so strong was the bond of marriage that the husband ought to leave the family of his parent in order to establish a new family with his wife"[lv]—

LS: He refers here to a passage in Genesis 2, verses 23-24, but here you see he said either through Adam or through Moses. Gronovius makes this commentary, as if Moses had attributed these words to Adam by[64] [literary license], as the historians do when they ascribe the speeches that they write to generals. This is really a very interesting passage from this point of view,[65] [concerning the literary technique of the Bible]. Now at the beginning of paragraph 10.

Reader:

> Now let us see what marriages are by the law of nature.[lvi] In reaching a decision in this matter, we must also remember that not all acts which are contrary to the law of nature are rendered invalid by it,[lvii] as it is apparent from the example of the extravagant gift;[lviii] but only those that are invalid if the essential point is lacking to give validity to the act, or in which the fault continues in the result of the action.[lix]

LS: We know there is the simple and beautiful case of the gift made by the Prodigal. It is a vicious act, because prodigality is a vice, but it is not a legally invalid act. Let us never forget this simple example, proving the difference between[66] [law] and morality. It is necessary to make that [distinction]. Now the point which he here makes is this: a son is obliged to revere his parents, yet he may nevertheless marry without his parents' consent. I believe this problem worries[67] [fewer] and[68] [fewer] people in our enlightened age.

Now we come to a much greater issue in paragraph 12, namely the question of incest. In the first[69] [section].

Reader:

> The marriage of those who are united by blood or by relationships of marriage presents a difficult question, which not infrequently gives rise to heated discussions. For if one tries to assign definite natural causes why such marriages are unlawful—just as they are forbidden by laws or customs—he will learn from experience how difficult, if not impossible, this task is.[lx]

[lv] "Thus when God said through Adam, or through Moses" is the translated text.
[lvi] In original, not "are by the law of nature"; "are valid by the law of nature."
[lvii] In original, not "in this matter, we must also"; "on this matter, we ought to."
[lviii] In original, not "as it is apparent"; "as is apparent."
[lix] Kelsey has "but only those are invalid in which the essential point is lacking." *JBP*, 2.5.10.1.
[lx] In original, not "this task is"; "the task is."

> For the reason suggested by Plutarch in his *Roman questions*, and accepted by Augustine in the *City of God*, (Book 15, chapter 16),[lxi] that friendships are extended more widely by contracting marriage alliances in many places, is not of so great weight that anything contrary to it would have to be considered void and unlawful. That which is less advantageous is not in fact thereby also illegal.
>
> Add the situation that may arise.[lxii] This lesser advantage may be offset by another greater advantage, not merely in the case of which God made an exception in the law given to the Jews, where a man that died without offspring;[lxiii] or in the similar provision, which was established by the Hebraic and the Attic law with reference to maidens who are sold heiresses which they call epiklēroi,[lxiv] for the purpose of keeping ancestral estates in the family, but also in many other cases, which are probably observed, or can be imagined.[lxv]

LS: The chief point: there is no rational argument against incest. As bluntly as that. The reasons given by[70] [Augustine] and Plutarch are reasons of expediency, and reasons of expediency are always, however strong—can always be countered because in a given situation what is generally expedient may be inexpedient. I believe that is one of the most important questions which we today would be inclined to see in anthropology, social science, and this kind of thing. The shocking way in which the question of incest is treated is kind of typical, but this was a very old question in the natural law tradition. On what ground do these respected laws rest? The reason given by Augustine, which is implied in what Plato states in his *Statesman*, is this: without exogamy, without compulsory marriage outside of the family, the *polis* would not be possible.[lxvi]

If you have only families, the family is much too small to defend itself, so many families must unite. But this union created for the defense of the family, called the city, requires that the bonds of affection go beyond the family. In order to have these bonds of affection, marriage within the family must be strictly forbidden. It's a very good argument as far as it goes, but of course Grotius says that it does not explain why this is universally forbidden. What is socially not good is not for this reason simply forbidden. Above all, it does not explain the halo of sacredness which these laws have. Let us read the next paragraph.

Reader:

> From this general principle I accept the marriage of parents of any degree with their descendants,[lxvii] the reason for the unlawfulness of which, unless I am mistaken, is quite apparent. In such a case the husband, who with the

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[lxi] This locating information appears in the print edition of the translation.
[lxii] "Add a situation which may arise" in the translation.
[lxiii] In original, not "where a man that died"; "where a man has died."
[lxiv] The word "epiklēroi" is marked inaudible in the original transcript.
[lxv] In original, not "which are probably observed"; "which are commonly observed."
[lxvi] *Statesman* 310a-b.
[lxvii] In original, not "I accept the marriage"; "I except the marriage."

> law of marriage is the superior, cannot show such respect to his mother as nature demands, nor the daughter to her father;[lxviii] for although the daughter in the marriage relation is inferior, nevertheless marriage itself introduces such an association that it excludes the respect belonging to the former relationship.[lxix]

LS: He makes here a qualification, and in addition this is also a great problem, and [it] is discussed by Montesquieu in the chapter of his work dealing with this question, and where he argues against this Grotian and traditional argument as follows. He denies that the relation of authority is destroyed by sexual intercourse and he gives the simple example of a husband and wife, because according to the older notion there is of course the idea that the husband is the authority for the wife in spite of the fact that they have sexual relations.[lxx] This is also a very long question.

In the next section, he shows, on very sound grounds, of course, that the example of the[71] [animals] who engage in these things as a matter of course is irrelevant, because it simply doesn't happen to be approved [by human customary law].[lxxi] More interesting is section 4.

Reader:

> In this connection we may well be surprised by the comment of Socrates. According to Xenophon, he found nothing blameworthy in such marriages except the disparity of age; for from that cause, he says, either sterility or deformity of offspring results. If this in fact were the only reason opposed to such a marriage, the marriage would surely not be void or unlawful, any more than a marriage between other persons, one of whom is much older than the other, as parents are ordinarily older than their children.[lxxii]

LS: This is very interesting because this argument of Xenophon, Book 4, chapter 4, is one of the few explicit discussions in classical literature.[lxxiii] There is another one which is equally well known, and I'm sure all of you or most of you know the other discussion of incest. Plato obviates this argument, doesn't he? How?

Student: He has it worked out that the brothers and sisters have a certain age, and in another age group in the *Republic* the father . . . .

[lxviii] In original, not "who with the law of marriage"; "who by the law of marriage."
[lxix] *JBP*, 2.5.12.2.
[lxx] Montesquieu discusses this matter in *Spirit of the Laws*, Bk. 26, chap. 14.
[lxxi] At 2.5.12.3 Grotius disqualifies the example of animal behavior in the matter of incest on the ground of human nature and "universal customary law."
[lxxii] *JBP*, 2.5.12.4.
[lxxiii] Xenophon, *Memorabilia* IV.4.23.

LS: In other words, no marriage between members of different generations and hence, if there is any bad consequence of[72] disparity of age between husband and wife, or between the two[73] [parents], this is avoided.[lxxiv]

Student: I thought that a half brother or sister would get married.

LS: Sure, that is the point. There is no provision, both in Xenophon in that passage and in the *Republic* implicitly, regarding an incest prohibition between brothers and sisters.[74] That Plato or Xenophon[75] [saw the problem with this], I take for granted, but it had something to do with the difficulty of getting a rational account for it.

Student: Doesn't this come up in a way in the[76] [drama] of Oedipus, in which the incest in Oedipus is not only a crime against nature but a crime against the city, because of the necessity for[77] [intermarriage] among the families.

LS: But it is not discussed in these terms. He has transgressed the divine law, and[78] [with the] notion of divine law in this age, [it] is impossible to draw a line between what is natural law or *ius gentium*, or maybe even natural [right]. It is clear that this problem is based on the generally accepted view that both killing one's father and having intercourse with one's mother belong to the most horrible crimes. That is of course the general view. I do not see what your difficulty is. Grotius as a philosopher in general goes beyond that by trying to find out what is the ground of this prohibition.

Student: I think in Oedipus the murder of the father is less of a crime than the incest, because[79] the law of the city is less violated by it, because of the necessity for[80] [intermarriage].

LS: Do you base this on explicit passages? I have the feeling for Oedipus the most horrible thing is his mother, and I believe it is not difficult[81] [for] a human[82] [being] to understand that. Killing an old man who you do not know was your father is not so revolting as the thought that one might have also unknowingly had intercourse with one's mother. But what the whole Oedipus myth means, and what it became under the hands of Sophocles, that is a long question. On the face of it, one can only say that Sophocles takes for granted the horrible character of these crimes without going into the question of why they are so horrible, in the way in which Grotius, Xenophon, and Plato do.

In paragraph 13, he speaks of the other forms of incest, and they are forbidden to all men by divine law, not by the divine law of the New Testament or of Moses, but of the divine law given to Noah, which then was given to all men. Therefore it obliges all men, but it is not a natural law. Paragraph 15, second section.

Reader: "Under these conditions in the state of nature there could be a true marriage between some persons as I have mentioned if the woman was under the husband's protective care and had promised him fidelity. Also, under the Christian law[lxxv]—"

[lxxiv] Plato, *Republic* 461d-e.

[lxxv] In original, not "between some persons"; "between such persons." *JBP*, 2.5.15.2.

LS: "In the status of the Christian law" [lxxvi]—that is the only reason why I wanted to mention that. *Status naturae*, the state of nature, is understood in contradistinction not to the civil state but to the state of the Christian, which was a traditional, most common view. Hitherto we have not seen any trace of Grotius' having understood state of nature in the Hobbean sense, or in any other than this well-known traditional sense.

In paragraph 17, he speaks of associations other than the matrimonial one, and in these associations the decision is with the majority, the alternative being manifestly inequitable, but there is no reason given why it is manifestly inequitable.

Let us look at the beginning of paragraph 18.

Reader: "If the votes are equal, no action will be taken, because there is not sufficient weight to carry a change. For this reason, where the votes for and against are equal, the accused is considered acquitted."[lxxvii]

LS: To what extent does he say anything about the right of the majority? That is clear: if they are equal, no decision can be made. But if there is a majority, why does the majority carry it against the minority? After all, that needs some reasoning, doesn't it? A change is to be made, and the majority has greater power for effecting the change than the minority. That is the Lockean reasoning. Grotius does not explicitly say that. Locke simply says that the right of the majority is a kind of reflection of the greater force of the majority.[lxxviii] In popular language, ballots replace bullets, and therefore ballots to some extent reflect the bullets.

Student: In an association that is based on consent, though, would anyone join if he knew that the minority would carry the measure?

LS: But still he would not know. I find most convincing this argument and I submit it to you as I have submitted it to many other classes, and they tell me that I am mistaken. I contend that there is no alternative to the majority vote, given the equality of all members, *i.e*. if all are equal as members, there is no other way. Of course it is different if you have, say, a shareholding company, and where you can rightly say those who have the big shares form a group by themselves, and those who have the medium shares, and the small shares. That is clear. But if all are presumed to be equal, there is no other way out, because what would happen? The only alternative would be to say that the minority carries it. If this happens, it is very simple. Everyone will vote against his convictions. Let us take a simple example. Cigarette taxes should be raised fifty percent, and you don't want it; then you vote in favor. And those who want it, vote against it. This is the same situation, only in a more roundabout way.

Student: Couldn't you have a rule that you need two-thirds?

[lxxvi] The Latin is *in statu legis Christianae.*
[lxxvii] *JBP*, 2.5.18.
[lxxviii] Locke, *Second Treatise*, § 96.

LS: This is of course possible, but it has one simple disadvantage. In important cases, it would be wise to do it, but in less important cases, it makes business very difficult, because very few decisions would be reached. With a fifty-one percent majority you are more likely to get decisions. But we are now concerned with the question: Since a qualified majority is still a majority, why the majority and not the minority? All members of course being equal—if they are unequal, the question in this form does not arise. You have two groups, the House of Lords and the House of Commons, and you make the House of Lords more powerful. But if there is equality—that's the question.

Grotius then turns, after he speaks of the matrimonial association, to the civil association, paragraph 23, which Grotius understands as a union of the fathers. The civil association is not a union of individuals, simply and[83] [unqualifiedly], but of the fathers, so the family is always presupposed. This was naturally the older view.[84] [Society] is an association of the fathers, and therefore the household, the structure headed by the father, is presupposed, and therefore not to be interfered with by civil society, which is superimposed. That was, I think, the very common view. The substitution of the individual for the father was a very great change, contributing a lot to the emancipation of the individual, that he is not a member of civil society through his father, but entirely by himself.

Generally speaking, Grotius says citizens may give up their membership in a given civil society, whereas[85] [it] is[86] somewhat different[87] in the case of the family.

Now the next great way in which men acquire power over other men[88] is subjection, as distinguished from consent or association. Surely subjection may be on the basis of consensus, but still it is not[89] association proper. It is clear that if you subject [yourself] to a conqueror, and accept the rule of a conqueror, this is not an association freely chosen, and on this basis it is possible—this kind of subjection is possible also into slavery, as he makes clear in paragraph 27, but we know already that he has no compunctions about slavery.

Reader: "The basic form of voluntary subjection is that by which a man gives himself into complete slavery, as those among the Germans who staked their liberty on the last throw of the dice; 'The one who lost,' says Tacitus, 'went into voluntary slavery.'"[lxxix]

LS: Next paragraph.

Reader: "That is complete slavery which owes lifelong service in return for nourishment and other necessary supplies; if the condition is thus accepted within natural limits it contains no element of undue severity."[lxxx]

[lxxix] In original, not "basic form of voluntary subjection"; "basest form of voluntary subjection." *JBP*, 2.5.27.1.

[lxxx] In original, not "other necessary supplies"; "other necessaries of life; and."

LS: Within natural limits here is understood in a very precise sense. Within the limits of natural right as distinguished from civil right and divine law.

Reader: "For the lasting obligation of labor is repaid with the lasting certainty of support, which often those do not have who work for hire by the day."[lxxxi]

LS: This is a kind of justification of slavery, that it is not simply[90] [a one-sided] contract, where one has the sole benefit and the other only the burden. This would [not] be unjust, because he has this kind of security.

Student: Why does he call it base?

LS: After all,[91] [is it not] disgraceful if you give yourself into the hands of another man who may be worthless compared with you, merely as in the case of the Germans, because you cannot control your gambling instincts? That is one reason, but even if [entered] otherwise, it is degrading. It is degrading to be at the beck and call of other human beings. As long as you allow anything in the sense of pride, nothing far-fetched, it is degrading. If you have a very strong sense of[92] [honor], and if you are in other ways very superior, you may not feel it,[lxxxii] but most human beings do not like to be bossed around, and especially by someone who may then despise them, and for quite a good reason. But we are concerned here with the legality of the thing, and there is no question of[93] [honor].

Student: In the paragraph above, he says the noblest form of voluntary subjection is adult adoption. He is also comparing the base form of slavery—subjection—to adoption, which may be, as far as Grotius is concerned—he can't think of anything more base than voluntary subjection.

LS: But I think we can understand it also on the basis of our own experiences in a society which does not know slavery. Any one of you who has ever been in a dependent position can understand what this means.

Student: [Inaudible] . . . westerners . . . tradition.[lxxxiii]

LS: I believe that is one of the greatest errors of which [I] myself have also been guilty, that by our famous social science traditions, we believe that all these things can be entirely different if people are differently conditioned. We have no notion of the deep and profound resentment of all these peoples who were subject to Western powers in the period of colonialism, because I had also believed, although perhaps not on the basis of social science, but of Aristotle, where they simply don't have the stamina, or whatever you call it, and accept it.[lxxxiv] All people, however primitive, really[94] [resent] it, to be

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[lxxxi] In original, not "of labor is repaid with the lasting certainty"; "to labor is repaid with a lasting certainty."
[lxxxii] Strauss may be thinking of Epictetus, a Stoic philosopher who lived as a slave and taught acceptance of one's fate in life.
[lxxxiii] The question, judging from Strauss's answer, seems to deal with modern colonialism.
[lxxxiv] See Aristotle, *Politics* VII.7.

subject, to be bossed around by others. There are some individuals, in all times, places, cultures, who . . . .

Student: But he says here, or somewhere else, that the Oriental is made for tyranny.

LS: But this is another matter. Tyranny is something which has to do with the question of—politically, as distinguished from personally. Given a sufficient degree of indifference, a distaste for this kind of business, then you would say: Well, let George do it. Of course, if someone never had an inkling, say [inaudible] two hundred years ago . . . .[lxxxv] I suppose that could not develop because there was no possibility, although I for one do not know how many nasty tricks played by slaves on their masters stemming from[95] [revenge]. In retrospect, I can believe that happened. Of course, if the punishment was so severe . . . . There are some very simple things: If the individual is not found out, they all are punished. You can keep it down, but if there is an opportunity . . . .

Paragraph 28. The master has no right of life and death over his slaves (servants), from the point of view of justice fully understood. This leads us to the question: May he not have the right of life and death in the sense of justice narrowly and strictly conceived? He evades this. According to natural right, the offspring of slaves are not slaves. This is a very humane provision, qualified by the fact that the civil law may, of course,[96] [legislate] the opposite.

In a way more interesting is the question discussed in paragraph 31 about public subjection as distinguished from private subjection, *i.e*. subjection of individuals to individuals, for example, of a people to some man. For Grotius there is no problem, for which he was severely blamed by Rousseau, and he took it for granted that a people may subject itself completely to an individual and this subjection, as Grotius points out, is based on consent. The subjection of a people [may be] owing to a crime, if the subjection is to him or those who have jurisdiction—so this may happen. Subjection owing to crime is legitimate if the subjector has jurisdiction, otherwise there is a question[97] [concerning] it.

I think we should read paragraph 32.

Reader: "Subjection as a result of crime arises also without consent—"

LS: I mean it may arise with consent, but it may also arise without consent.

Reader: "whenever a person who has deserved to lose his liberty it[lxxxvi] is by force brought under the power of him who has the right to exact the penalty. We shall see below who has the right to inflict punishment."

[lxxxv] The point seems to be that a people might lack interest in rule, and so designate one person ("George") as absolute ruler. The "inaudible" may be a reference to a country subjected to colonialism two hundred years ago. The train of thought seems to shift in the middle of this paragraph; there may be a sentence or phrase that was not transcribed.

[lxxxvi] This word is not in this place in the translation.

LS:[98] [Second paragraph] now.

Reader:

> In this way individuals can be brought under private subjection, as at Rome those were who did not respond to conscription, those who did not correctly report their property to the census,[lxxxvii] and afterward also women who cohabitated with another's slave; and also peoples can be brought into public subjection for public crime. But there is a difference in this respect, that the servants of a people is naturally lasting, since the suppression of the parts does not prevent it from remaining one people.[lxxxviii]

LS: Is this not amazing and in a way quite shocking? If a nation committed a crime, even if all the people who could have conceivably committed the crime are dead, [the people] are still legitimately slaves forever and ever. But later on some qualifications come up.

Reader: "On the other hand, the penal servitude of individuals does not pass beyond the persons themselves, because the crime attaches to the person the criminal."[lxxxix]

LS: But since the state is not mortal, in the way in which individuals are, the state may be subjugated. That is quite extraordinary.

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[1] Deleted "this was the."
[2] Deleted "[inaudible]."
[3] Deleted "not."
[4] Deleted "[inaudible]"
[5] Deleted "you"
[6] Deleted "[inaudible]."
[7] Deleted "eternal."
[8] Deleted "enter."
[9] Deleted "contradiction."
[10] Deleted "way."
[11] Deleted "[inaudible]."
[12] Deleted "so."
[13] Deleted "about."
[14] Deleted ". . . "
[15] Deleted "and."
[16] Deleted "[inaudible]."
[17] Deleted "that."
[18] Deleted "[inaudible]."
[19] Deleted "of."
[20] Moved "not."
[21] Deleted "that at." Moved "that."
[22] Deleted "have."
[23] Deleted "different."
[24] Deleted "then."

[lxxxvii] In original, not "census"; "censors."
[lxxxviii] In original, not "suppression of the parts"; "succession of the parts."
[lxxxix] In original, not "to the person the criminal"; "to the person of the criminal." *JBP*, 2.5.32.

[25] Deleted “[inaudible].”
[26] Deleted “is not there.”
[27] Deleted “impossible.”
[28] Deleted “decision.”
[29] Deleted “good.”
[30] Deleted “normal.”
[31] Moved “thing.”
[32] Deleted “[inaudible] under.”
[33] Deleted “black.”
[34] Deleted “[inaudible] wonderful [inaudible].”
[35] Deleted “[inaudible].”
[36] Deleted “[inaudible].”
[37] Deleted “of Lontine.”
[38] Deleted “modern.”
[39] Deleted “so.”
[40] Deleted “[inaudible].”
[41] Deleted “[inaudible].”
[42] Deleted “end.”
[43] Deleted “end.”
[44] Deleted “of.”
[45] Deleted “[inaudible].”
[46] Deleted “as.”
[47] Deleted “what.”
[48] Deleted “took it into his elan.”
[49] Deleted “to think.”
[50] Deleted “solidified.”
[51] Deleted “of.”
[52] Deleted “of.”
[53] Deleted “does.”
[54] Deleted “of.”
[55] Deleted “does not belong.”
[56] Deleted “[inaudible].”
[57] Deleted “and imposes.”
[58] Deleted “paragraph.”
[59] Deleted “childhood.”
[60] Deleted “piety [inaudible].”
[61] Deleted “sentence.”
[62] Deleted “female.”
[63] Deleted “paragraph.”
[64] Deleted “[inaudible].”
[65] Deleted “[inaudible].”
[66] Deleted “joy.”
[67] Deleted “less.”
[68] Deleted “less.”
[69] Deleted “paragraph.”
[70] Deleted “[inaudible].”
[71] Deleted “[inaudible].”
[72] Deleted “this.”
[73] Deleted “[inaudible].”
[74] Deleted “are [inaudible].”
[75] Deleted “did not see the desired change in this.”
[76] Deleted “[inaudible].”
[77] Deleted “[inaudible].”
[78] Deleted “this.”

[79] Deleted “of.”
[80] Deleted “[inaudible].”
[81] Deleted “from.”
[82] Deleted “feeling.”
[83] Deleted “unqualifiably”
[84] Deleted “the family.”
[85] Deleted “this.”
[86] Deleted “a.”
[87] Deleted “case.”
[88] Deleted “and that.”
[89] Deleted “the.”
[90] Deleted “an [inaudible].”
[91] Deleted “it is not.”
[92] Deleted “humor.”
[93] Deleted “[inaudible].”
[94] Deleted “distaste.”
[95] Deleted “an [inaudible].”
[96] Deleted “dejurate.”
[97] Deleted “of.”
[98] Deleted “Chapter 20.”

Session 6: October 22, 1964

Leo Strauss: You drew attention to *ius gentium*, but I am not sure whether you have properly understood it.[i] What in man is the judge of expediency?

Student: Reason.

LS: And how is this related to prudence?

Student: Quite closely.

LS: And now read your last sentence.

Student: Quite naturally, natural law restricts it, tempered by expedience, not prudence.

LS: Not prudence.

Student: But prudence somehow is connected with morality.

LS: But are we not supposed to, in our choice of the expedient, to limit it to the decent expedient. I mean it[1] [is] expedient, if someone lacks money, to[2] [forge] a check, but it is not a prudent act. The prudent act is to[3] [work], because that is straightforward and you don't cheat anyone.

It is of course[4] [an etiological] problem in the first place. [LS writes on the blackboard] *Ius gentium* has an ambiguity. In one sense it is something extremely simple. It is a part of Roman municipal law. The Roman legislator in his wisdom decided that the exchange of property between people who are not Roman citizens strictly understood, that this exchange would be much too cumbersome, in the case of foreigners, Roman citizens, and non-Roman citizens, and therefore a much easier, less formal,[5] [law was employed, the "*ius gentium*."] This was a great liberalization. It had to do with the extremely formalistic character of Roman civil law proper. This had to do with the religious background of Roman property, of course landed property, but not only that. So *ius gentium* was[6] the law [that] obtained between Roman citizens and foreigners. Secondly, and that is a more interesting point, *ius gentium* was defined in some Roman law texts in contradistinction to natural right. Natural right is what nature taught all animals, such as self-preservation, procreation of offspring. All animals do that. But the *ius gentium* is that which has its basis in reason, whereas no reason is needed for the natural law proper, because all animals have it.[ii]

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[i] The session began with the reading of a student's paper. The reading was not recorded.

[ii] *Ius gentium* means "law of peoples" or "law of nations," and was originally devised to apply across all the diverse peoples of the Roman empire (who were left largely free to use their own legal codes in their internal affairs). It might in a simple sense be thought of as the first "international law." Prototypically, the *ius gentium* consisted of the legal precepts that were shared across all or most of the peoples, which led naturally to the thought that it represented a

Now it was very easy, and that was done with particular clarity by Thomas Aquinas in his *Summa,* to say what the Roman lawyers called *ius gentium* is in fact natural law. Thomas Aquinas makes a distinction along these lines. He calls natural law strictly understood the highest principle of natural right, and the consequences[7] [derived] from it, *ius gentium*. *Ius gentium*, is in this sense, of course natural law. It is only[8] [by tradition], so to speak, that this is called *ius gentium*.[iii]

A practically new thing is that *ius gentium* loses entirely these two meanings and means from now on what we call international law. It was never that in Roman law. It was the fetial law as the Romans called it, the law of governments to foreign cities or states. Fetial law was also a part of the municipal Roman law, what the Roman law prescribed as how to start a war. . . .

Let us now speak of international law. If I were cursed to be the translator of Grotius, I would stupidly say in each case *ius gentium*, and let the reader find out what it means in this given[9] [context], because if you translate it according to your interpretation of the[10] [context], you make the reader forget the ambiguity, which is part of the situation in Grotius, that the ambiguity still exists. In addition, you may be mistaken as to what it means in this particular[11] [context]. Now what is the character of international law? It is voluntary, *i.e*., it is not natural. It[12] [presupposes] an agreement between human beings. It means more specifically [that] it is not self-evident. Natural law is self-evident, either directly or if you make a few steps[13] [to arrive at it].

I'm sorry, I made a mistake. You remember the two meanings of *ius gentium* in Roman law. Now the new thing in Grotius first is that *ius gentium* means voluntary law, *i.e*., it is not natural law, and surely also not municipal law. It is positive law; it is based on some agreement. A good example is from last time and the prohibitions against incest. Here Grotius implicitly denies that the ground of these prohibitions can be made fully evident. You remember his polemics against Xenophon and other writers who tried to give[14] reasons.[iv]

Why does Grotius call it *ius gentium*? This kind of law which is not natural, why does he call it *ius gentium*? Because the agreement is not as the other agreements are, local, but the agreement is universal, at least to that extent that all civilized nations[15] [share] that agreement. This could still mean, if there are *n* civilized nations, *n* independent agreements, although they are identical in[16] [content].

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kind of *consensus gentium*, or consensus of mankind, regarding justice. This in turn suggested to some that the *ius gentium* reflected natural law. Note that Grotius sometimes uses *consensus gentium* as an indication that a certain precept is part of natural law. The distinction between *ius gentium* and natural law that Strauss refers to may be found in Justinian's *Institutes* 1.2-3. By this understanding, the *ius gentium* is a rational improvement upon the bare law of nature. There are elements of this in Grotius as well.

[iii] Thomas, *Summa* 2.1.95.4.

[iv] See session 5.

What Grotius somehow assumes is that this is not a mere accident, that all these nations made the same agreement. This agreement is one which is not limited to any particular state. It can also therefore create a relation of *right* among all men, at least among all civilized men, therefore it can take on the meaning of international law. But here is an ambiguity, because international law as Grotius understands it is partly natural, and partly *ius gentium*. It cannot be municipal, because if it were municipal it wouldn't bind any other nation. If I understand the present-day understanding of international law of civilized nations, it is understood that[17] international law obligates the individual state, and to that extent [is] part of the municipal law.

But for Grotius it is clear that it is not simply part of[18] national law. It is essentially above national law and does not require a formal agreement by the individual state that they will abide by international law. Did I make this a bit clearer than it was before?

Student: In what way is international law part of the municipal law?

LS: Do you not commit a crime as an American citizen if you do something against international law?

Student: I believe there is something incorporated—

LS: Yes. Is there not something in the text of the Constitution about it?

Student: Treaties.

LS: Then one could say, if treaties, then all the more those things which do not require treaties,[19] [create] obligation between states.

Student: The most important parts of international law, as we understand it, are those parts which bind the nation as a nation. International law says that a nation has to do something, rather than an individual.

LS: In more recent times, the distinction was made between international law proper and private international law. Now let me come back to the main point. The main point is that *ius gentium* does not simply mean in Grotius "international law," because what he understands by international law is partly natural. Let us leave it at that for the time being.

We skipped two chapters last time . . . and I happened to read this most enjoyable author for the *n*th time, Macaulay in his *Essays*, whose work contains many passages which I would insert in a reader for international political science if I had the time to make such a reader. This has something to do with what we discussed last time. This is in his essay on Sir James Mackintosh's *History of the Revolution*. "Undoubtedly we ought to look at ancient transactions by the light of modern knowledge. Undoubtedly among the first duties of a historian to point out

the fault of the eminent men of former generations."[v] He means of course also the merits. This has something to do with what we discussed last time, but I haven't read this with the necessary emphasis. "Undoubtedly we ought to look at ancient transactions, *by the light of modern knowledge*."[vi]

That seems to contradict with what I said last time. Do you see the difficulty here? I said it is our duty to understand Grotius' [book] as he understood it. To look at the present situation is not the first duty of a historian. Do we not lose ourselves in antiquarianism if we do not judge, say, Grotius in the light of the best knowledge we have, *i.e*., contemporary knowledge? For example, if we study Aristotle's doctrine of the heavens and simply refuse to consider what happened through Newton, Galileo, etc., is this not a kind of childish amusement? Is the same not true, although not so visibly perhaps, if we study Grotius? Now what do we say to that? I think we have to face that.

Student: First, perhaps it is important to understand these writers as they understood themselves, then to peregrinate from the point of view of modern knowledge.

LS: This distinction would seem sound enough. In other words, before you judge, you have to know the facts. A kind of premature concern with judgment is fatal. That is commonsensical and absolutely true, but[20] [is it right in this case]?

Look, he was a very great admirer of Bacon, Macaulay, and he has written a very well-known essay on Bacon—very rhetorical, but very worth reading. And he judged Bacon in the light of modern knowledge, *i.e.*, especially natural sciences around 1840, and also the philosophy which he had. And then forty years later Bacon was viewed in a very different way, because people said this talk about experience and experiment—that is so misleading, because all sensible people at all times have had recourse to experience. But the peculiar thing is the mathematical character of the new sciences, and Bacon at first glance has nothing to do with this.[21] That is the work of people of an entirely different[22] [type]. When I was a student, Bacon had a very bad press, and the[23] [verdict of Harvey], that he philosophizes like a Lord Chancellor, was regarded as the last word about Bacon.[vii] Then later I began to read Bacon, and for the first time I was absolutely surprised how wrong this view which I had imbued in school was in the face of this enormous fertility and genius, imagination, which Bacon manifestly shows when you begin to read[24] [him].

You are supposed to "judge the ancient transactions in the light of modern knowledge," say contemporary knowledge. Contemporary knowledge changes from generation to generation, more or less. Therefore, this judgment must change. If historical objectivity means objective judgment of the merits and demerits of the truth or untruth, then there cannot be objectivity. Does this not follow? Historical objectivity. Churchill has a good

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[v] In original, not "among the first duties"; "it is among the first duties" in Macaulay.
[vi] Thomas Babington Macaulay's essay, "Sir James Mackintosh," may be found at http://www.readbookonline.net/title/39459.
[vii] William Harvey, a contemporary of Bacon and scientific virtuoso in his own right, is reported to have made this remark.

discussion of that in his *Marlborough*, in his discussion of the Peace of Utrecht. I do not have it here, but you can easily find it. He shows how this peace, which was controversial at the time, looked very reasonable for some time, and then very unreasonable, and then very reasonable, and he says how can you judge that.[viii] You can never judge in hindsight. You have to judge on the situation as it was then known, or would be known to sufficiently careful people. The standards you can find in any situation, not horizontally, but only vertically. In our present language, virtue and vice, prudence and folly—these are the things which man can understand equally at all times.

In this country we have a good example in the Lincoln discussions, the[25] [controversy] in this century on the case of Lincoln, and where Harry Jaffa, in his book on the Lincoln-Douglas debates,[ix] simply tried to put the thing on a solid basis—what precisely did Lincoln intend? And not the unforeseen and unforeseeable consequences of the Civil War. Now this was a kind of supplement to what I said last time.

Now let us turn to . . . unless someone has something at the top of his mind, or the tip of his tongue . . . .

Student: My problem with natural law is that it seems every now and then Grotius does speak of[26] [animals]. Will you say categorically that he goes along with Aquinas, and identifies natural law with right reason, or does he also include what the[27] [animals] do, in other words, the rearing of offspring . . . .

LS: This statement, that natural law is what nature taught all animals, and *ius gentium* is what requires reason—this is not a Thomastic distinction; it is the Roman lawyers' distinction. Thomas, in his generally respectful way, doesn't simply say these Roman lawyers talked nonsense, but he takes it as a statement of intelligent men and tries to show in what way it would make sense. In other words, Thomas would not call[28] what nature taught the[29] [animals], he would not call [this] natural law strictly speaking. Natural law would require in all cases the presence of reason. Natural law, as he defines it,[30] [is essentially] participation in the eternal law by rational beings, so the[31] [animals] are not strictly speaking, subject to a natural law.[x]

In Thomastic terms, there are three kinds of natural inclinations, and that is the fundamental division of natural law in the Thomastic sense: self-preservation; sociality, which includes of course procreation; and knowledge, especially knowledge of God. These are the three fundamental [32] [types of inclination in man].[xi]

[viii] For Churchill's discussion of the Peace of Utrecht and its aftermath, see chapter 27 ("The Secret Negotiations") and chapter 36 ("Utrecht and the Succession"), in *Marlborough: His Life and Times*, vol. 4, bk. 2 (Chicago: University of Chicago Press, 2002), 873-84, 991-1005.
[ix] Harry Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (Chicago: University of Chicago Press, 1999).
[x] Thomas lays out this argument in *Summa Theologica*, 2.1.93-94.
[xi] *Summa*, 2.1.94.2.

We see what Grotius is doing. Grotius is concentrating on the lowest, on self-preservation, which Hobbes does later on in a much clearer and [more] massive way.

We come now to chapter 6, dealing with derivative acquisition, not original acquisition. Derivative acquisition, which may be[33] [through] human[34] [act] or[35] [through] law.[xii] Acquisition through human [act][36] means above all acquisition through alienation; in other words, original acquisition is occupation, say a piece of land, but if it is already occupied, how can you come into the property? Only if the original owner alienates it in one way or another, by gift or whatever it may be.

There is a natural right which controls these human acts of all alienation. Natural right is not merely that which precedes all human acts, like self-preservation, but also things which presuppose human acts. The key point [here], from the[37] [perspective] of public law, is[38] that government may be alienated, and that is of course incompatible with popular sovereignty, but Grotius does not accept the principle of popular sovereignty.

There are certain difficulties here, as can be seen from paragraph 4 of chapter 6.[xiii] The acquisition through law—the most well-known case is inheritance. We also have property which is not originally acquired by occupation, which has already an owner, but which changes hands not by alienation. I mean then it would be some kind of gift or exchange or what not, but the law determines that if in the case of the owner dying, it goes to the oldest son or whatever.

There is no right to confiscate property of shipwrecked people, because this property has to go to the heirs. This is a point which was at that time apparently controversial.

In paragraph 4, chapter 7, according to the strict natural right, the parents are under no obligation to feed their children. Now Grotius does not deny that men in general have a natural inclination towards their children, but this does not mean an unqualified obligation to bring them up. Grotius does not simply exclude,[39] [such an obligation, though he is not entirely clear about this]. The right to expose or kill children after birth—I suppose he has in mind cases of famine and so on.[xiv]

But in the broader sense of natural right (identical with virtue), there exists of course a duty to bring up one's children, and also a duty to leave one's property to one's children. He mentions that according to Roman law bastards do not inherit. That means that is a possible flaw of Rome. According to natural right, the distinction between legitimate and illegitimate children does not apply.[xv]

[xii] The title in the published translation refers to "secondary acquisition" (*acquisitione derivativa*). *JBP*, bk. 2, chap. 6.

[xiii] This paragraph deals with the question whether a people may sever part of itself, delivering that part to a different sovereign, without that part's consent. *JBP*, 2.6.4.

[xiv] Possibly referring to *JBP* 2.7.7.

[xv] *JBP*, 2.7.4.3, 2.7.8.

The duty to feed parents is not equally ordinary or common as the duty to feed children, in paragraph five. That is an old story which is already discussed by Democritus, according to which the concern for the offspring is greater than the concern in the other direction.[xvi] The difficulty for the father as distinguished from the mother, to know whether the child is his, is discussed by Grotius in paragraph 8, chapter 7.

Reader:

> To the rule just stated an exception must be admitted. In case there is not satisfactory agreement as to who the father of the child is.
>
> > It is true that absolute certainty is not to be found[xvii]—

LS: About facts—whether facts in general cannot be absolutely certain. There is no contradiction in your saying there is no doubt.

Reader:

> But whatever is want to happen in the sight of people derives its own degree of certainty from evidence.[xviii] In this sense it is said that there is certainty in regard to the mother, because both men and women are available who are present at the birth and witness the bringing up.[xix] The same degree of certainty cannot be had, however, concerning the father[xx]—

LS: And then he gives a lot of quotations about[40] [this fact]. Now what is the simplest way out of this difficulty? The most mathematical way out? If the mother knows it, the father does not necessarily know it. Let the child be the mother's, and the power of the father be only indirect. That is Hobbes's solution.[xxi] Grotius does not go so far.

We note here in his discussion of marriage that he is not concerned with marriage being concerned for the sake of mutual help, and for the sake of upbringing of children. Let us read the beginning of paragraph 8, second section.

Reader:

> But illegitimate children also have a right, even after the distinction between them and the legitimate children has been introduced by law. Euripides has said:
>
> > In nothing is the bastard less than the lawful son;
> > By law he is held down.

[xvi] Grotius cites Lucian and Aristotle on this question at *JBP* 2.7.5.1.
[xvii] The full sentence reads: "It is true that absolute certainty is not to be found in an induction from facts" (2.7.8.1). Strauss completes the thought, and the reader resumes with the next sentence.
[xviii] In original, not "is want to happen"; "is wont to happen."
[xix] "And in this sense" marks the beginning of the sentence in the translation.
[xx] *JBP*, 2.7.8.1.
[xxi] See *Leviathan*, chap. 20.

> Nevertheless such children can be adopted, unless the law prevents. Formerly, Roman law of Anastasius permitted such adoption.[xxii] Afterwards, in order to favor lawful marriage, a rather more difficult system of putting illegitimate on the par of legitimate children was devised, through nomination of the son to the municipal senate, or by subsequent marriage.[xxiii]
>
> An example of an ancient adoption of illegitimate children is found among the sons of Jacob, who were placed in equality with the sons of free mothers and shared the inheritance equally.[xxiv]

LS: Gronovius has a feeling that Grotius finds the civil law, which gives the legitimate children a better deal than to the illegitimate children,[41] somewhat inequitable and honorless. That could very well be.

Now we make a big jump. In this chapter he is naturally dealing with inheritance, [so] he naturally deals also with hereditary monarchy. I mention one point only: in paragraph 19,[42] a prince may refuse to be the heir to the goods and debts of his predecessors, as distinguished from the public power. That is assuming that his father had lots of private debts and he can get rid of them by saying, I don't want his property and I become the king without them. Gronovius strongly disapproves of that, and it reminds him of courtier politicians.

In paragraph 27 of this same chapter, at the end of the first paragraph—

Reader: "Succession to sovereign power is not, in fact, included in sovereign power, and in consequence has remained in the state of nature, in which there was no jurisdiction."

LS: So here the "state of nature" has not simply the meaning non-Christian, not subject, but does have the meaning of a status where there was not yet jurisdiction. It is in fact the Hobbean meaning. It is interesting that this expression occurs so very rarely and so casually. *Status naturalus* is the Latin expression.

Now let us then turn to today's assignment in chapter 8. The meaning of *ius gentium* as international law—let us read paragraph 1, section 2, the beginning.

Reader: "This law of nations is not international law, strictly speaking—"

LS: *Ius gentium*.

Reader: "is not *ius gentium*, strictly speaking, for it does not affect the mutual society of nations in relation to one another[xxv]—"

[xxii] In original, not "a Roman law"; "Roman law."

[xxiii] In original, not "putting illegitimate on the par of legitimate"; "putting illegitimate on a par with legitimate." In the original transcript the words "a rather more difficult system of" are marked inaudible.

[xxiv] In original, not "in equality with"; "on an equality with." *JBP*, 2.7.8.2.

LS: In other words, here *ius gentium* does [not] have the meaning of international law.

Reader:

> it affects only each particular state of people in a state of peace.[xxvi] For this reason a single people can change its determination without consulting others; and even this happens, that in different times and places a far different common custom, and therefore a different law of nations (improperly so called) might be introduced. This, we see, did actually happen[xxvii]—

LS: If I understand this correctly, the improper use of the term is the older use, which has nothing to do with relations between states, but within each state. It is sufficient that you are aware of this ambiguity.

Student: In your introduction, you suggested that international law was partly natural, and therefore international law did not mean *ius gentium*, but this seems to be giving a different reason here. I don't understand. It does not affect the mutual society in relation to one another. There's a disagreement, a disagreement about general things.

LS: Now let us clear up the ambiguity. [LS writes on the blackboard] *Ius gentium*—let us take it as international law. [International law has] a rational, *i.e*., natural part. And here [is the] voluntary [part], *i.e*.,[43] [based on consent]. Is this clear? But then *ius gentium* means what? Equal to voluntary, universal rights. A voluntary right, based on human[44] [agreement], but universally valid or at least among all civilized nations. That in itself has nothing to do with international law. It has only indirectly, because it can be presupposed to be recognized by any other nation. This is surely different from international law, for a very good reason—that international law includes natural right, and this [voluntary universal right] excludes it, because it is all voluntary. It is really not difficult. Shall I spell it out again?

Ius gentium, equal to international law, consists of a rational or natural right part, and of a voluntary or consensual convention. *Ius gentium* in the sense of voluntary universal right differs, is not identical with international law, because it is entirely voluntary, and therefore does not as such contain natural right.

Student: In either case, though, wouldn't it affect the mutual society of nations; otherwise, it would be[45] [purely domestic].

LS: Yes, but on different grounds, on very different grounds. Take such a simple thing as oaths. Oaths are as important within states as between them. Oaths are not necessarily relevant only to international law. Treaties [are purely international], of course, if you take them in the present-day sense;[46] [however], pacts take place all the time among

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[xxv] *JBP*, 2.8.1.1.
[xxvi] In original, not "each particular state of people"; "each particular people."
[xxvii] *JBP*, 2.8.1.2.

citizens.[xxviii] This ambiguity is not difficult if you write it on a special sheet and look it up from time to time.

Regarding this point, I have reference to chapter 8, paragraph 26.

Reader:

> These observations I have written down in order that he who finds the expression "law of nations" in the Roman legal writers may not at once take as meant that right which cannot contain,[xxix] but may carefully distinguish precepts according to nature from those which are according to nature only under certain circumstances—

LS: "With a view to a certain status."[xxx]

Reader:

> and may distinguish, further, the laws common to many peoples separately from those which contain the bond of human society.
>
> For the rest, this should be understood, that if by this law of nations, improperly so called, for even by a statute of the people,[xxxi] a single method of acquiring property has been introduced without distinction of citizen or foreigner, immediately thereupon foreigners acquire a right; and if the enjoyment of that right is hindered the injury as such that it may furnish a just cause of war.[xxxii]

LS: That is a practical reason, you see that. If the same right is given to foreign traders as to the merchants who are citizens, and if the guest country discriminates against that foreign trader[47] [it is unjust].[48] [Even if] the other state, of which the foreign trader is a citizen, does make this invidious discrimination, yet this is a good reason for[49] [war]. That is a practical reason.

Student: Would you say that this distinction,[50] [a law] common to many people separately[51] [and one "containing the bond of human society"] is comparable to the distinction[52] [of natural and voluntary law]?

LS: That is not clear enough. By the way, I mentioned in my first meeting the *Concise History of International Law* by Nussbaum, Oxford, 1945 or so, and he is an international lawyer.[xxxiii] Maybe he can be helpful.

[xxviii] That is, the *ius gentium* regarding the sanctity of oaths applies in both international and purely domestic settings.
[xxix] In original, not "contain"; "be changed."
[xxx] The Latin is *pro certo statu.*
[xxxi] In original, not "for even by a statute of the people"; "or even by a statute of a people."
[xxxii] In original, not "as such that it may"; "is such that it may." The words "a just cause of war" are marked inaudible in the original transcript. *JBP*, 2.8.26.
[xxxiii] Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947). This was mentioned in session 1.

Paragraph 6 of chapter 8—he mentions in passing again the beginning of possession . . . .

Reader: "The reason is that the beginning of possession is the connection of body with body."

LS: Occupation obviously has this meaning. You sit down on the land, but in any form of acquiring property, such a bodily[53] [connection] is required. This is of great importance for the understanding of Locke's doctrine of property, because labor is sweat off your brow, your body. That is so interesting, because partly in earlier times, and surely in more modern times, there are quite a few intangible rights, but the basic point is that bodily relation. Paragraph 9, same chapter, the beginning.

Student: Doesn't Locke make this even stricter when he says his paradigm of the appropriation of property is the process of[54] [digestion]?[xxxiv]

LS: Surely. I always said, God forbid that I should minimize the originality of John Locke. Surely, Locke makes it radically different because he asserts—now what is the key difference between Locke and Grotius and the whole tradition prior to Grotius? There is no original common property in the sense that something like a pact is required in order to allow for private property. There never was a state of original community in which there did not exist the right of one hundred per cent exclusive appropriation. The right to exclusive appropriation of the individual is[55] [coeval] with man; this is Locke's key point. The root of property—and he uses a more beautiful expression—the foundation of property, the source of property, is in the individual, because he needs appropriation for his self-preservation, and that is the only important consideration, not original communism. Everyone has in[56] [himself] the need, the absolute need, and hence the right, to appropriate to the exclusion of everybody else.

Student: I found a very interesting precursor[57] [in] this earlier essay of Locke on the power of a simple magistrate. It is a story about a city in China that was under siege and surrendered, and the conquerors ordered the people to cut off the hair which they wore on the back of their head, and they refused and they were all slaughtered. But Locke says why should man prefer the ownership of a mere expression of the body, to what he called the tangible goods of nature.[xxxv]

LS: I believe other people than Locke might have made the same observation. It is doubtless [correct], I admit, and it comes with particular good grace from Locke, because his whole teaching doesn't give[58] [undue emphasis][xxxvi] to this.

[xxxiv] See Locke, *Second Treatise*, chap. 5, § 26.

[xxxv] The example is from Locke's *Second Tract on Government*, written about twenty years before the *Second Treatise*. See *Locke: Political Essays*, ed. Mark Goldie (Cambridge, Cambridge University Press, 1997), 59-60).

[xxxvi] This emendation supposes Strauss's point to be that bodily parts are less important than survival.

Student: But I saw this as a precursor of the notion of acquiring property through[59] [digestion] . . . .

LS: But it is not so clear on this subject. No, there is a much clearer statement in his much earlier notes, where it is made absolutely clear that government has nothing to do whatever with vice or virtue, only with defense of property, and of course it leads to the statement that property is only the more developed form of self-preservation. I put it occasionally somewhat aphoristically: property is self-preservation which has taken on flesh. In other words, self-preservation you can also have when you are[60] [living] in the state of nature. But then property—at least in the state in which it was interesting to Hobbes, what is now called capitalistic property—it is still[61] self-preservation, and that is its ultimate justification. [This is] the deepest natural need of man—if[62] [it] were not, it could not be property justified.

Paragraph 9, at the beginning.

Reader: "For if we take into consideration that which generally happens—"

LS: What *generally* happens—not in all cases.

Reader: "peoples have taken possession of lands not only with sovereignty, but also with property ownership, before the fields have been assigned to individuals. Seneca says—"

LS: Let us read only about Cicero.

Reader: "Cicero: 'By nature, moreover, there is no private ownership—'"

LS:[63] [No things are] private by nature.

Reader: "'but such arises either from ancient occupation, as in the case of those who formerly entered unoccupied territory; or from victory, as in the case of those who have gained the possession from war; or from some law, agreement, condition, or lot.'"[xxxvii]

LS: This is of course a commonsensical view. If you look around, you would find that most people say this is so. The delicate question arises when you say: Well, how can you acquire property by war? After all, this is the other people's territory. Assuming that the prince was wicked and attacked you, that doesn't give you a right to take away his property, a question discussed at great length by John Locke.[xxxviii]This remark is quite striking, and has been repeated *n* times. Nothing is private by nature, *i.e*., by nature everything is in common.

Student: Are you suggesting this differs from Locke?

[xxxvii] In original, not "gained the possession"; "gained possession." *JBP*, 2.8.9.1.
[xxxviii] See *Second Treatise*, chap. 16.

LS: Yes, this is different. But it is different not only from Locke. I would say that that remark of Cicero is not as profound as the remark we find in another ancient writer, namely Plato. This supplies the link, say, between Cicero and Locke. Plato speaks of things which are by nature private, of one's own, and what is that? The body. That is your hand—there's no question about it. By nature no one made your hand, and it's not due to any contract.[xxxix] Now what Locke does is to state, as it were, on the basis of this deeper insight of Plato: I am going to show you that property is in a sense natural, namely the body, self-preservation, bodily grasping, use of the body, fundamentally food, and so on. So I thought we should mention that.

Student: It seems to me that[64] [Cicero] has an analogy.[65] [The first to take a seat in a public theater rightly "possesses" that seat,][xl] and therefore we have natural acquisition by occupation, which is the way it arises in Locke.

LS: No. But he speaks here at the end of this quotation, "and similar is the description of private possession." In other words, he has spoken first of how peoples acquire property. But even in the case of individuals, it would be this occupation. Why ancient occupation? Well, someone else would also occupy it, but[66] you have already occupied it. We are the first occupiers, and after some time, you own it or your children or grandchildren own it by ancient occupation.

There is a great difference whether you speak of occupation or labor. You know in the whole labor development leading up to socialism and this kind of thing, what is really the title-giving thing is not occupation, but labor. This implication would be unintelligible from the older view. I am aware of the fact that there is in Locke a very great ambiguity, namely, labor as a title to property is one thing, and labor as the origin of all value is an entirely different thing, and by a very clever[67] [mix-up] of these two very different considerations, does he produce this argument of the[68] [fifth] chapter [of the *Second Treatise of Government*]. Let us look at paragraph 19.

Reader: "If, however, we consider the truth of nature—"

LS: Literally, "the natural truth."[xli]

Reader:

> just as the Roman jurists also have concluded that in the case of mingling of materials common ownership is introduced in proportion to what each has furnished, because an adjustment could be made naturally and in no other way, so when things consist of material in form, as if of parts, if the material belongs to one and the form to another, it naturally follows that

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[xxxix] Strauss may be thinking of the discussion of communism in Book V of the *Republic*, 462b-e.
[xl] I am speculating that the student is thinking of this example from Cicero (*de Finibus* 3.20.67), which was used by Grotius at 2.2.2.1 to illustrate the right of use and occupancy.
[xli] The Latin is *naturalem veritatem.*

> the ownership becomes common in proportion to the value that each has.[xlii]

LS: "Naturally" is here understood very emphatically, in accordance with the natural truth, in accordance with the natural right. I mean, that doesn't mean "merely [natural]" of course, but this very emphatic meaning.[xliii] That is one of the examples of a decision based on natural right strictly understood.

Now let us turn to chapter 9, paragraph 3. When do empires or dominions cease? Let us [first] read [the title of] paragraph 2.

Reader: "*Similarly, the rights of a family are extinguished when the family dies out*"[xliv]

LS: If there are no longer any relatives, however remote—of course, it doesn't mean that anybody may take it here; there may be a stipulation that this may go to the public treasury; that is clear. But the family has lost its right.

Reader:

> *So also the rights of the people are extinguished if the people ceases to*[xlv]
> The result is the same if a people has ceased to exist.[xlvi] Result, Isocrates, and that to him the Emperor Julian, said that states are immortal;[xlvii] that is, they can continue to exist because the people belongs to the class of bodies that are made up of separate members,[xlviii] but are comprehended under a single name, for the reason that they have "a single essential character"[xlix]—

LS:[69] [Grotius] is strictly interested in this artificial body, which is the people and not ships and this kind of thing. Of these artificial bodies, like peoples, it is said they are immortal in a sense—[not] strictly understood, because he admits that [a] people may cease to exist.

[xlii] In original, not "material in form"; "material and form." *JBP*, 2.8.19.2.
[xliii] Recall that Grotius sometimes uses "natural" in the sense of "primitive," something to be improved upon by human art or compact.
[xliv] *JBP*, 2.9.2.
[xlv] "*So also the rights of a people are extinguished if the people ceases to exist*" in the translation.
[xlvi] "The result is the same if a people has ceased to" is marked inaudible in the original transcript.
[xlvii] "Isocrates, and after him the Emperor Julian" is the translated text.
[xlviii] In original, not "to exist because the people"; "to exist because a people."
[xlix] The translation continues: "as Plutarch says, or as a single spirit, as Paul the jurist says. Now that spirit or 'essential character' in a people is the full and perfect union of civic life, the first product of which is sovereign power; that is the bond which binds the state together, that is the breath of life which so many thousands breathe, as Seneca says. These artificial bodies, moreover, are clearly similar to a natural body; and a natural body, though its particles, little by little are changed, does not cease to be the same if the form remains unchanged, as Alfenus argues after the philosophers." *JBP*, 2.9.3.1.

What is it that makes a populace a people? And this is called here by a Roman lawyer a single spirit. In the nineteenth century the folk spirit or the folk mind,[l] in connection with German Romanticism and Hegel, played a very big role; in the eighteenth century when Montesquieu wrote his book, *The Spirit of Laws*, he did in fact also use spirit of nations. This has long history. In a note here he refers to Aristotle.

Reader: "Aristotle in his *Politics* says that government is the life of the city."[li]

LS: But Aristotle—[70] does he speak about the people, when he says that? Aristotle says that[71] [about] the regime,[72] that which gives a character to a people. The people, the human beings, are the matter, and this matter is formed, is given a character, is given a life, *i.e*., a specific life, by the regime. This life may be oligarchic, democratic, tyrannical, or what have you. So Grotius changes this somewhat. The people in Grotius' sense precede the government. The opposite is true in Aristotle. The people as not mere matter, as *constituted*, presuppose the regime. The difference between Grotius and Aristotle can be explained sufficiently by the fact which he mentions in paragraph 8 of the same chapter, end of the first section.

Reader: "There is no reason why anyone at this point should cite Aristotle against me. Aristotle declares that the state does not remain the same when the form of government is changed, just as a melody, he says, does not remain the same when it is transposed from the Dorian to the Phrygian mode."[lii]

LS: That is a famous passage in the Third Book of Aristotle's *Politics*, when he makes it clear that—you have the same men, same individuals, and now they form part in a tragic chorus, and tomorrow in a comical chorus, and Aristotle says they are two different choruses. That they are composed of different individuals is absolutely irrelevant, because the tragic chorus is not a comic chorus.[liii] Similarly, if a society is organized democratically now and oligarchically tomorrow, it is not the same society. For Aristotle this is not metaphoric speech, as someone would say Labour Britain is not the same country as pre-Labour Britain, which we would not hesitate to say colloquially, but for Aristotle it has a strict meaning.

If a society as a society is dedicated to a different idea, to a different value system, then it is no longer the same society, because this dedication is a most important political phenomenon. Surely a society can also change in other respects: it can become more populous, less populous, all kinds of things can happen, but the most important thing is that which the society looks up to, so from the point of view of the society itself, not from the point of view of any arbitrary standard set up by some professor or what not, but what does the society look up to? We don't have to go beyond that. It is its ideals, or values, or however you call it, and that is what Aristotle means by the regime.

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[l] These are alternate translations of the German *Volksgeist*.
[li] Note to 2.9.3.1; Aristotle, *Politics* 1295b1-2 in Book IV (*politeia* is the word translated as "government" here, which Strauss translates as "regime" in what follows).
[lii] "Phrygian" is marked inaudible in the original transcript. *JBP*, 2.9.8.1.
[liii] Aristotle, *Politics* III.3.

Now we turn to chapter 10, where he discusses the obligations which others have to us on the basis of our right, as distinguished from the obligations which we have regarding the things which belong to us. The obligations which others have—simple examples—finders must return to us the things which belong to us.

Let us read paragraph 1, section 2.

Reader:

> From things which exist there arises the obligation by which a person, who has property of mind in his possession, is bound to do what he can to restore it to my control.[liv] He is bound, I say, to do what he can; for there is no obligation to do what is impossible, or even to return the property at his own expense. The possessor is, however, under obligation to make the possessions known, in order that the other may recover his own.

LS: In other words, he does not have to invest an enormous amount of money in a private detective to discover the true owner.

Reader:

> Just as, in the state of community ownership, a certain equality had to be observed, that one might have the use of the common property as well as another, so, after the introduction of property ownership, a kind of mutual arrangement was entered into between the owners, that one who had another's property in his possession should restore it to the owner.[lv] If, in fact, the force of ownership is limited to this, that property should be restored to the owner only on demand, the right of ownership would have been too weak, and the protection of property too expensive.[lvi]

LS: Let us read also the beginning of section 4.

Reader:

> Now inasmuch as this obligation is binding upon all men, as it is by a universal agreement,[lvii] it creates a certain right for the owner of property,[lviii] the result follows that individual agreements, as being later in point of time, are thereby restricted.[lix]

LS: Now you see that this right seems to mean that the right of the owner presupposes the introduction of property and, more than that, a universal contract. The question arises: Is this still natural right strictly understood? Is it not already *ius gentium* in the sense of

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[liv] In original, not "property of mind"; "property of mine."
[lv] In original, not "between the owners"; "between owners."
[lvi] *JBP*, 2.10.1.2.
[lvii] In original, not "as it is"; "as if."
[lviii] In original, not "it creates"; "and creates."
[lix] *JBP*, 2.10.1.4.

voluntary universal right? This is not quite clear. But I think it is made clear at the beginning of the next section.

Reader:

> As regards to nature of ownership,[lx] we see no difference whether ownership arises from the universal principles of law or from the law of a particular country.[lxi] Ownership, in fact, always carries with it a natural implications, and among these is the obligation on the part of every possessor to restore property to its owner.[lxii] This is affirmed by Marcianus, when he says "that by universal principles of law a suit can be entered for property against those who possess it wrongfully."[lxiii]

LS: This Roman lawyer says by *ius gentium*, but he of course does not necessarily mean it in the Grotian sense. I think what Grotius means is what this Roman lawyer called in this particular passage, *ius gentium* would in a stricter language mean *ius naturale*. This is only in passing. Now let us see what else. At the end of the second paragraph, we will find something of interest. Read this.

Reader: "If the two rules stated have been rightly understood, it will not be difficult to reply to the questions which are commonly raised by jurists and by theologians who lay down rules to the tribunal[lxiv]—"

LS: I think this is an indication also of the difference between the jurists and the theologians. The theologians decide also issues which are not decided by the law. That is the way in which the old commentator understands it. Paragraph 12.

Reader:

> Tenthly, by the law of nature, whatever a person has received for a changeful cause,[lxv] or for an honorable service which it was his duty to perform, that now has to be restored.[lxvi] Yet, such a rule has been introduced, not undeservedly, by certain laws. The reason is that no one is bound to render account for his property unless it belongs to another. But in the case of the consideration, the ownership had with the consent of the former owner.[lxvii]

[lx] In original, not "to nature of ownership"; "the nature of ownership."
[lxi] In original, not "we see no difference"; "it makes no difference."
[lxii] In original, not "with a natural implications"; "with its natural implications."
[lxiii] In original, not "a suit can be entered"; "suit can be entered." *JBP*, 2.10.1.5.
[lxiv] Kelsey here inserts "of conscience." *JBP*, 2.10.2.3.
[lxv] In original, not "a changeful cause"; "a shameful cause."
[lxvi] In original, not "that now has to be restored"; "does not have to be restored."
[lxvii] The translation: "But in the case under consideration, the ownership passed with the consent of the former owner."

> The case will be different if there was illegality in the method of receiving the money, as for example by extortion. That, in fact, involves a different principle of obligation which I am not concerned with.[lxviii]

LS: That is very interesting. If someone earns money by some disreputable transaction—let us take the famous case of prostitution. To whom does the money belong? That the prostitute received for her questionable services? What shall we say? Not as strict and broad moralists who might say: It doesn't make any difference whether this lost woman, or how do you call them, men who control them—pimps—the pimp has it, or is it not necessary also to[73] [take] into account also that[74] [services were rendered], and even there to make a distinction between who has the right to ownership then. Now I believe it is necessary, if only for the sake of a minimum of[75] [order], to let the law courts take problems of this kind.[76] Grotius of course takes this lawyer's view. Natural right as such is indifferent to the difference between a disreputable and a decent cause. This is translegal unless the civil law makes prostitution a crime. That's another matter; then the whole transaction is not valid. But generally speaking, the lawgiver does not forbid prostitution because it is too complicated to suppress. But if he permits it, he has also to accept the consequence.

I do not believe that this is anything novel in Grotius, but it is an interesting example of the distinction between natural right narrowly conceived, and justice in the broad sense,[77] [being] practically necessary.[78] [Another] example is that which we gave on an earlier occasion, of the prodigal's gift. Does a man think of a poor man, poor, old, and sick man, with fourteen children, who gets a hundred-dollar bill from a prodigal—and as an act of prodigality, not as an act of charity, if he gives also hundred dollar bills to all kinds of people. Is this poor old man, with whom we all have compassion, the rightful owner? Yes, because he didn't use any blackmail, he didn't use extortion, steal, rob.

[79][The distinction is made earlier], in the *Summa* of Thomas Aquinas, where the question is discussed of simony. The question is this: Does a man who accepted money for simony have to restore it, or is he compelled to use it for pious purposes only, *i.e*., not for his own purposes? The question arises then also: Did the man who committed simony not sell what was not his own in the first place?[lxix] This is another consideration which would come in here.

But the main point, I believe, should be very clear: that it is necessary to make a distinction between right narrowly conceived and right in the broad sense of the term, and also the question is: What is the principle [on which the distinction is made]? Is there no principle except convenience depending on the circumstance, or is there a principle? That would be the question. This will come up again. At the beginning of the next chapter, we find another example.

Reader:

[lxviii] Kelsey has "different principle of obligation with which I am not here concerned." *JBP*, 2.10.2.

[lxix] *Summa Theologica*, 2.2.10. Simony is the buying or selling of ecclesiastical offices or favors.

> The order of our work has brought us to the obligation which arises from promises. Here we find ourselves at once opposed to François de Connan,[lxx] a man of exceptional learning. For he maintains the opinion that according to the law of nature, as well as the law of nations, no obligation is created by those agreements which do not contain an exchange of considerations; but that nevertheless such agreements are honorably carried out if only the matter is of such a nature that it would have been honorable and consistent with some other virtue to fulfill them even without the promise.[lxxi]
>
> Furthermore in support of his opinion he brings forward not only the statements of jurists but also these things,[lxxii] that the individual who rashly believes a person that makes a promise without any reason for it, is not less at fault than the person who has made a worthless promise; then, the supportance of all would be greatly imperiled if men should be bound by a mere promise,[lxxiii] which perceives often from the love of display rather than from a purpose,[lxxiv] or from a purpose indeed, but a trivial and ill-conceived purpose; finally, that it is just to leave something to the honesty of each person and not to that fulfillment,[lxxv] according to the necessity of obligation; that it is disgraceful not to fulfill promises, not because the act is unjust, but because it reveals the worthlessness of the promise. We cite also the testimony of Cicero,[lxxvi] who said that promises ought not to be kept if they are of no advantage to those to whom you have made the promise, or that they are more harmful to you than they are advantageous to whom you made the promise.[lxxvii]

LS: This is a controversy, but let us see also in very general terms what it is. Are promises obligatory strictly understood, or is the performance of promises only a matter of decency or virtue? Now Grotius thinks that promises are in principle obligatory. Let us read section 3.

Reader:

> Now this opinion in the general terms in which it is stated by Connan, cannot stand. For first, it follows therefrom that agreements between the kings and different peoples have no force so long as no part of such agreements is carried out,[lxxviii] especially in the regions where no set form of treaties or guarantees of engagements exist. Again, no reason can, in

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[lxx] This name is marked "inaudible" in the original transcript.
[lxxi] In original, not "but that nevertheless"; "that nevertheless."
[lxxii] In original, not "things"; "reasons."
[lxxiii] In original, not "then, the supportance of all"; "then, that the fortunes of all."
[lxxiv] In original, not "which perceives"; "which proceeds."
[lxxv] In original, not "and not to that fulfillment"; "and not to exact fulfillment."
[lxxvi] "He cites" in the translation.
[lxxvii] Kelsey has "or if they are more harmful to you than they are advantageous to him to whom you made the promise." *JBP*, 2.11.1.1-2.
[lxxviii] In original, not "between the kings"; "between kings." The words "Connan cannot stand. For first" are marked inaudible in the original transcript.

> fact, be found why laws, which are a sort of common agreement of the people and are so characterized by Aristotle and Demosthenes,[lxxix] should be able to add the force of an obligation to agreements, when the desire of each individual striving in every way to bind himself is unable to add such force, especially in cases where the civil law offers no impediment.[lxxx]
>
> There is the further fact that ownership of property can be transferred by an act of will if it is sufficiently manifest, as we have said above.[lxxxi] Why then, since we have equal right over our actions as over our property, may there not be transferred to a person also the right to transfer ownership (this right is less than ownership itself) or the right to do so?[lxxxii]

LS: In other words, Grotius comes down in favor of promises, the obligatory character of promises, and the key point in the argument is this: that the fundamental social compact had the character of a promise, so if you deny the obligatory side of a promise, you destroy civil society as such.

It might be good to consider from this point, or look up from this view, Hobbes's *Leviathan*, chapter 14, what he has to say about promises. But there are certain qualifications—let us see what is the most interesting case. Paragraph 5, section 3.

Reader:

> The case will be clearly different if the agreement is made on the sea, or on a desert island, or by means of letters of those who are at a distance.[lxxxiii] For such agreements are governed by the law of nature alone, as are also the agreements of those who hold sovereign power, in so far as this affects their sovereign right. For the promises which they make in their private capacity even those laws have effect which make the act void in the interest of their own advantage, but not when the act is to their loss.[lxxxiv]

LS: In other words, pacts among sovereign states are subject in themselves only to natural right, and therefore the importance of limiting international law, as we call it, to natural right, because the other rights it does not bind. Now one could say that this explains altogether these remarks, the connection between international law and the concern with natural law in Grotius' works.

[lxxix] In the original transcript "and Demosthenes" is marked inaudible.
[lxxx] In original, not "when the desire of each individual striving"; "while the desire of each individual striving."
[lxxxi] In original, not "if it is sufficiently manifest"; "which is sufficiently manifest."
[lxxxii] In original, not "the right to do so"; "the right to do something." *JBP*, 2.11.1.3.
[lxxxiii] In original, not "letters of those"; "letters between those."
[lxxxiv] "For in the promises which they make in their private capacity even those laws have effect which make the act void where this is to their own advantage, but not when the act is to their loss" is the text of the translation of this passage.

In paragraph 7, he discusses the question—which promises are valid, but what about promises made from fear, when you are held up, are not valid. Paragraph 7, section 2.

Reader:

> On the whole I accept the opinion of those who think that persons who make the promise under the influence of fear is bound by it, if the municipal law, which can annul or diminish an obligation, is not taken into consideration.[lxxxv] For in such a case there is a consent, not conditional as we just now said in regard to the person in error, but absolute. As Aristotle in fact has rightly stated, the man who throws his property overboard because of the fear of shipwreck would wish to save it conditionally, if there was no danger of a shipwreck. But, considering the circumstances, the place and time, he is willing to lose his property.[lxxxvi]

LS: Go on.

Reader:

> At the same time, this, I think, is indubitably true, that if the person to whom the promise is made has inspired a fear, not just but unjust, even though slight, and the promise has resulted therefrom, he is bound to release the promisor, if the latter so wishes, not because the promise was without force, but on account of the damage wrongfully caused. And[lxxxvii] the exception of[lxxxviii] this, which is allowed by the law of nations, I shall explain below in its proper dimension.[lxxxix]

LS: In other words, if you make a promise because you are in fear of somebody else, then you are bound. But if you make a promise to a man who has put you in this fear, then of course you are not bound. How does Hobbes decide this case on the basis of natural law?

Student: It doesn't matter who puts you in fear.

LS: In the state of nature, promises extracted by fear are valid.[xc] What is the reason why Hobbes decides so differently? Civil society rests on a promise extracted by fear, surely.[80] [Of course] Hobbes allows that if civil society as established can forbid[81] blackmail, then you may not pay[82] [blackmail].

[lxxxv] In original, not "that persons who make the promise"; "that the person who makes a promise."
[lxxxvi] In original, not "willing to lose his property"; "willing to lose his property absolutely."
[lxxxvii] "And" does not appear in the translation.
[lxxxviii] In original, not "of"; "to."
[lxxxix] The translation: "The exception to this, which is allowed by the law of nations, I shall explain below in its proper connection." *JBP*, 2.11.7.2.
[xc] *Leviathan*, chap. 14.

Student: Is it not the case that the man is still—the original giver has given his consent, and therefore the property does belong to the other man who has used fear. In that sense,[83] [the promise binds], and that is similar to Hobbes, but Grotius says negatively that the receiver is then bound to return it, because he used coercion or fear. But isn't the impact of the consent binding on the original giver in a similar way to Hobbes?

LS: Not exactly. The final decision differs from Hobbes. Up to a certain point[84] [Grotius] goes along with it on the basis of Aristotle and the *Nicomachean Ethics*, that actions from fear are not necessarily involuntary. Take the example of the man who prefers to lose his merchandise rather than himself. You know the passage we read before: that is taken from Aristotle, and Aristotle says that this man of course voluntarily preferred survival to wealth, that this voluntary reference was due to very special circumstances does not do away with the fact that he[85] [did] what he willed.[xci] This is the point of agreement between Grotius and Hobbes. In other words, to the extent to which Hobbes agrees with Aristotle, Hobbes also agrees with Grotius.

Student: It seems a bit strange if we take this example from Aristotle, because this would seem to indicate that the law that says that the king is the owner of all shipwrecked property is in fact a valid one.

LS: No, the king is not owner, the king would be owner of everything if all his subjects were slaves. That was a case very rare at least in that time in Western Europe, and therefore there were free men and there was property. Now if there was property, not all property would belong to the king, and there are certain conditions under which the king can confiscate property, but not simply that this property is found and there is a shipwrecked boat and the question is to whom it belongs. The mere fact that the owners have perished does not make it noblemen's property.

Student: The point is in this example from Aristotle, which he quotes sort of approvingly, that[86] considering the circumstances of the time and place,[87] [the owner] is willing to lose his property absolutely,[88] [he] has given up right of his property.

LS: Sure, but that's an entirely different case. This man threw merchandise away, in order to save his life. But in the case of these people who perished, they did not throw it away. Some part of the boat in which part of their wealth was,[89] "survived." They didn't make a choice. If you think in sentimental terms, one could say it does not make any difference for the poor people concerned. But this is not the point of view of lawyers or courts. They must decide, to whom does that belong? The stuff found in the ships belongs to the heirs of the people who stayed on the boat. How do you call the goods[90] driven by the ocean?

Student: Flotsam.

[xci] See Aristotle, *Nicomachean Ethics* 110a1-1110b9 in Book III, and the discussion in session 7.

LS: We have not heard what Grotius says about it, but it might happen in the mid-ocean and it might never come to any shore. We have to wait before we find any discussion of flotsam.

Student: If[91] [Grotius says promises] forced by an unjust fear are not binding, what then is the case of the tyrant, the right of the tyrant . . . ?

LS: But the question is whether the obligation in his case is based on fear, and not on the consideration that generally speaking every violent change is[92] [bad] from the point of view of the public good. When Paul said "Be subject to the higher powers,"[xcii] it is construed in the large sense that it means also be subject to tyrants. Some Royalists of the seventeenth century didn't mean of course "be subject to the tyrants," because otherwise they would be shot or quartered. Paul excludes that for conscience sake. In other words, be truly of it, and not merely—well, most of us would[93] [obey] a tyrant if he were sufficiently efficient, but of course not be obedient to him in our hearts, for conscience sake. Let us read paragraph 8 of the same chapter, section 2.

Reader:

> Again, if the thing is not at present within the power of the promisor, but may be at some future time, the validity of the promise will be in suspense; under such circumstances the promise ought to be thought of as made on the condition that the thing should come into the power of the promisor. But if the condition under which the thing could come into the power of the promisor implies his power to obtain it, the promisor will be bound to do whatever is morally right, in order to fulfill the promise.[xciii]

LS: Is it not an equitable decision? I think we should also read these things from the point of view of how they strike our sense of ethics and to see that we do have a sense of ethics, and to find out that this is not merely[94] because we are the heirs of this particular tradition, but because it is intrinsically equitable. In some cases, I have no doubt that Grotius mistook what was equitable out of the biblical or the Roman tradition, for what is rationally equitable, but this is not our case.

Reader: "In this class also ordinarily the civil law makes many promises void which would naturally be binding."

LS: To repeat, *naturally*, always emphatically.

Reader:[xciv] "of future marriage by a man or woman who is now married; such also are not a few promises made by minors, or by children subject to parental control."

[xcii] Romans 13:1.
[xciii] *JBP*, 2.11.8.2.
[xciv] "Such is the promise" begins the passage in Kelsey's translation. *JBP*, 2.11.8.3.

LS: But this promise of future marriage means that the husband has a living wife, and just as soon as this wife is dead, and then of course the other woman cannot sue him for breach of promise. You see what kinds of things lawyers must be interested in . . . .

Student: This sense of equity that we see from Grotius' natural right—this is his natural right strictly speaking, then it is radically different from Hobbes's natural right, and also Aristotle's.

LS: Very well, and Hobbes also of course is not blind to equity, but he decides differently. Now what is the ultimate reason for that?

Student: It seems to me that there is more of a sense of decency as opposed to calculation in Grotius.

LS: Sure, but still, if we disregard all frills and we come down to brass tacks, what's the difference? We have discussed this before. What is the fundamental situation of man? Grotius, as well as Aristotle and all the others who belong to this tradition, start from the normal situation, and then they say that in extreme situations—shipwreck, and super-depressions, and I don't know what—many things cannot be done, cannot be fulfilled. That they knew and as it were they tried to see the phenomena of man's rights and duties as of human justice in its most developed, in its most rich and concrete, dense form. After all, what kinds of things we would do if there were this severe holocaust, if we were reduced to an impossible situation, no one can say,[95] but we can be sure that there would be no place for niceties. Still, a situation in which we can be nice, not in the colloquial sense, in which we can be precise, and conscientious, and careful, allows for the best[96] [in] us to come out much more fully than in an extreme situation, doesn't it? Is it not better to take one's bearings by the normal situation, normal not in the sense of the statistical average, but in the sense of the situation in which the best man can be fully developed, rather than of an extreme situation? We will come to that question later on when we come to the question of war, in which of course there is the classic case, where niceties are very hard, but this is the point. Hobbes was a bit rough and so on, but he was a very decent man. There is a rumor that he had an illegitimate child, so if you hold it against him, you are free to do so, but also I have never heard anything, except that he was a very combative man, but he was otherwise a decent man.[97] [His] error was a great theoretical error. He knew these nice things, if only from reading the older texts, which he had read.

Student: This suggests to me though that there is going to have to be a[98] [revision] made in an earlier formulation distinguishing Grotius' general natural right from the particular, a formulation having a beginning and end, and then what Hobbes did was to say, strike out the top.[xcv]

LS: Disregarding Hobbes's teachings—

[xcv] The student seems to be referring to the two-tiered character of Grotius' moral teaching, the lower level being based on the *prima naturae*, or "beginning," and the higher on man's end as a rational and social being.

Student: But that would suggest that Grotius' "strictly understood natural right" is equal to Hobbes's natural right. But there's a difference.

LS: But the question—very well, you would say even in what Grotius teaches regarding this lowest sphere, he differs. [LS writes on the blackboard] Here is the sphere of right strictly understood, which, as I said last time, is the only one which Hobbes recognized, whereas Grotius recognizes it, but not as strictly right,[99] [or the whole of right]. In a way, the meaning of the whole thing changes. This meaning showed in all kinds of different places, in [100] [unexpected] quarters. That's absolutely correct.[xcvi] That's very true.

Now in chapter 12—at the end of paragraph 3; read please for those who are interested in social history.

Reader:

> The exchanging of an act for an act may have innumerable forms, according to the diversity of the act. But I do that you may give. In the one case, I do that you may give money; this in acts of daily service is called letting and hiring, and in the act of guaranteeing indemnity against chance losses it is called guarding against risk, or, in everyday speech, insurance, a form of contract which was formerly scarcely known, and is now very common.[xcvii]

LS: That's interesting, since insurance [first] came up more or less at that time, and an[101] [innovator] in the seventeenth century conceived of life insurance without which our lives [now] seem to be unthinkable. This whole kind of insurance once did not exist. In other words, social security is only a derivative form of that more broad concern with security which emerged in the seventeenth century. It is not merely social history in the narrower sense. It is a great change in man's attitudes in every respect.

We will discuss the end of chapter 12 next time.

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[1] Deleted "isn't."
[2] Deleted "force."
[3] Deleted "pick."
[4] Deleted "a teleological."
[5] Deleted ". . . ."
[6] Deleted "what."
[7] Deleted "delivered."
[8] Deleted "a traditional burden"
[9] Deleted "conflict."
[10] Deleted "conflict."
[11] Deleted "conflict."
[12] Deleted "is presupposed on."
[13] Deleted "around it."

[xcvi] Strauss's point seems to be that the existence of the higher part of right affects Grotius' whole account. Human law, for example, can enforce obligations that go beyond narrow or strict right.
[xcvii] In original, not "and is now very common"; "but is now very common."

[14] Deleted “rational.”
[15] Deleted “are based on.”
[16] Deleted “context.”
[17] Deleted “the.”
[18] Deleted “the.”
[19] Deleted “took the (inaudible).”
[20] Deleted “does it right with the issue?”
[21] Deleted “mathematical.”
[22] Deleted “side.”
[23] Deleted “word of the [inaudible] . . . .”
[24] Deleted “[inaudible].”
[25] Deleted “[inaudible].”
[26] Deleted “[inaudible].”
[27] Deleted “[inaudible].”
[28] Deleted “what the [inaudible].”
[29] Deleted “[inaudible].”
[30] Deleted “[inaudible] the very suppressance of.”
[31] Deleted “[inaudible].”
[32] Deleted “[inaudible].”
[33] Deleted “viewed to.”
[34] Deleted “fact.”
[35] Deleted “may be viewed to human fact, or to law.”
[36] Deleted “fact.”
[37] Deleted “view.”
[38] Deleted “here.”
[39] Deleted “but he is dark about that.”
[40] Deleted “[inaudible].”
[41] Deleted “that he finds that.”
[42] Deleted “that.”
[43] Deleted “correct.”
[44] Deleted “[inaudible].”
[45] Deleted “within.”
[46] Deleted “now.”
[47] Deleted “[inaudible]”
[48] Deleted “Although.”
[49] Deleted “[inaudible].”
[50] Deleted “[inaudible].”
[51] Deleted “[inaudible].”
[52] Deleted “of natural and voluntary law” replaces “[inaudible].”
[53] Deleted “[inaudible].”
[54] Deleted “suggestion.”
[55] Deleted “co-equal.”
[56] Deleted “itself.”
[57] Deleted “of.”
[58] Deleted “a [inaudible].”
[59] Deleted “suggestion.”
[60] Deleted “[inaudible].”
[61] Deleted “the.”
[62] Deleted “that.”
[63] Deleted “No things are.”
[64] Deleted “[inaudible].”
[65] Deleted “[inaudible].”
[66] Deleted “then.”
[67] Deleted “mishap.”
[68] Deleted “first.”

[69] Deleted “[inaudible].”
[70] Deleted “what.”
[71] Deleted “of.”
[72] Deleted “of.”
[73] Deleted “call.”
[74] Deleted “[inaudible].”
[75] Deleted “murder.”
[76] Deleted “of matter.”
[77] Deleted “is.”
[78] Deleted “More safe, for.”
[79] Deleted “Either first”
[80] Deleted “therefore.”
[81] Deleted “to pay.”
[82] Deleted “a penalty.”
[83] Deleted “[inaudible].”
[84] Deleted “it.”
[85] Deleted “showed.”
[86] Deleted “but.”
[87] Deleted “he.”
[88] Deleted “if the owner.”
[89] Deleted “quote.”
[90] Deleted “which is”
[91] Deleted “Thomas.”
[92] Deleted “not good.”
[93] Deleted “believe.”
[94] Deleted “due.”
[95] Deleted “of that” deleted.
[96] Deleted “of.”
[97] Deleted “the.”
[98] Deleted “provision.”
[99] Deleted “[inaudible].”
[100] Deleted “unrespected.”
[101] Deleted “[inaudible].”

Session 7: October 27, 1964

Leo Strauss: I am not quite sure if you are right in your criticism of Grotius.[i] What does he mean when he calls the treaties[1] [onerous]? The fact that it serves the case of honor is not the point. It is[2] [onerous] because it lays the burden on the Romans, namely, to come help, to wage war.

Student: The fact that a burden is laid upon the parties I didn't think necessarily meant that the treaty itself was[3] [onerous], since I thought the question was whether or not the burdens or the benefits prevail . . . .

LS: Well, all right, we will come to that. I would only like to mention one point, regarding the chapter on oaths. To which kind of right do oaths belong?

Student: Properly speaking, oaths do not belong to the law of nature because they don't confer a right on the person. They belong rather to that class of agreements of religious feeling, gratitude . . . .

LS: This is too vague, I think. We must use the clear Grotian terms.

Student: It makes you directly responsible to God.

LS: But since oaths made by pagans are also valid . . . .

Student: But he says in the same place that oaths sworn by false deities are still[4] [binding].[ii]

LS: Sure. In a word, it belongs to *ius gentium*. That is my impression, but we will come to that later.

Now the most general point you made and which is a good starting point for my initial remarks is that you observed generally a shift toward natural law, and you brought this together with secularization. That was the word you used. That is very much true.

Now let me begin first with a general observation of the problem before we turn to our discussion of today's text. Let us remember the former statement which Grotius made about his intention. To raise the study of law to the status of an art—art, of course, in the Aristotelian sense, not in the present-day sense. He doesn't want to turn law into poetry or sculpture. But only the natural law can be raised to such a status, because of its unchangeability.[iii] Therefore the higher rank is natural right. This is indeed his general tendency, and we have found many references and shall find further references in the

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[i] Strauss responds to a student's paper, which was read at the beginning of the session. The reading was not recorded.
[ii] Grotius says this at *JBP*, 2.13.12
[iii] Prolegomena, 30.

sequel that will show that Grotius is very much concerned whether this particular institution is a natural right institution, or is it of *ius gentium* or divine law, and so on. It is not sufficient for him to make a general distinction between natural right and the other kinds of right, but he wants to carry that through into the discussion of each legal subject—what is natural right and what is not natural right.

If this is thought through to its conclusion, we would then have a complete body of natural right and nothing but natural right. We could also have a volume 2: What does *ius gentium* say about natural right, and what do the practices of the United Nations say about it? But of course Grotius does not do the[5] [whole] thing within the covers of a single book. So the end product of this kind of thought would be a kind of code of natural right, or to use a phrase which was used in the late eighteenth century, a *code de la nature*, a code of nature, which is of course the same as a code of reason, for reasons which I cannot go into now. This implies in later development [that] a perfect society would not need anything but that code of nature: the perfectly rational society. Needless to say, Grotius is very far from that, but in order to see Grotius properly, we must take this possibility into consideration.

To see the most simple reason, and the most obvious reason why Grotius has nothing to do with these later vagaries, is what? Which massive fact striking every reader of every chapter at any time, that he does not present us such a code of natural right? Well, the fact which you all have seen: the quotations, the reliance on authority. A code of nature doesn't need any authorities. We have never read this very important passage which shows the big change taking place, in Hobbes's *Citizen*, chapter 2, paragraph 1.

Now please read, speaking in a clear voice . . . .

Reader:

> Of the law of nature concerning contracts.[iv] All authors agree not concerning the definition of the natural law, who notwithstanding do very often make use of this term in their writings. The method therefore, wherein we begin from definitions, and exclusion of all equivocations, is only proper to them who leave no place for contrary disputes.

LS: That is clear.

Reader: "For the rest, if any man say that some is done against the law of nature, one proves it hence, because it was done against the general agreement of all the most wise and learned nations[v]—"

LS: All the most wise, or the most civilized. This is of course a minor difference, whether it is done against the consent of all nations or of the most wise nations.

[iv] This is the title of the chapter. Hobbes, *De cive*, chap. 2, para. 1.

[v] In original, not "that some is done against"; "that somewhat is done against."

Reader: "but this declares not who shall be the judge of wisdom and learning of all nations—"

LS: In other words, we must first establish whether these nations were in fact wise before we can use them as authorities. Yes?

Reader: "another, hence, that it was done against the general consent of all mankind, which definition is by no means to be admitted, for then it were impossible for any but children and fools to offend against such a law—"

LS: Children and fools, because on the whole they do not know what they are doing. Therefore they are ignorant and cannot do anything against the law.

Reader:

> for sure, under the notion of mankind, they comprehend all men actually endued with reason. These, therefore, either do naught against it, or if they do ought, it is without their joint accord, and therefore ought to be excused; but to receive the laws of nature from the consents of them, who oftener break, than observe them, is in truth unreasonable; besides, men condemn the same things in others, which they approve in themselves; on the other side, they publicly commend what they privately condemn—

LS: And so on. In other words, no reliance on the consent of nations or anything, that's completely out. This is the big divide between Grotius and Hobbes, and between a kind of transition, if one can say that, a transitional stage[6] [in] the big revolution.

Hobbes really gives you a code of natural law, in chapters 2 and 3 of *Citizen*, and chapters 14 and 15 of the *Leviathan*. But there is nothing here of authority—not quotation of Cicero and [7] [practices of] ancient tribes. This is the first one.

Now the second great change which Grotius prepares is his understanding of right strictly understood. This has a long history going back to Aristotle, as we have seen. We limit ourselves to the Grotian stage. Right strictly understood is identical with the minimum requirements of morality. One can say the lowest but most urgent part of morality—crudest. [Little] refinement is required in all that, you see, that one shouldn't murder. But still, in the case of Grotius this limitation to right strictly understood is based on the premise that man is a social animal by nature, and this is connected with the fact that Grotius interprets right strictly understood in terms of the Ciceronian distinction between the things first by nature and the end, the end being the natural end of man.

The great divide is when Hobbes says man is not by nature a social animal, so the definition of right has no intrinsic relation to society. Right in the strict sense means emphatically right as distinguished from duty, although there are duties based on it, but it is itself a right. The primacy of right belongs to this and again, this is much clearer in Hobbes than in Grotius.

Now we come to another point which we have observed. The right of nature is not the absolute standard in Grotius. It may be modified and even contradicted by the *ius gentium*, and of course by divine right. So even if there were such a thing as sovereignty of the people most in accordance with natural right, this would not be very interesting because natural right can always be changed by *ius gentium*. There are no inalienable rights of man. The *ius naturale* can be modified. To quote a phrase, *patientia in ius transit*: suffering, willing submission, goes over into right. So if you had a primary right to something, if you forego the exercise of it, it ceases to be a right. For example, the prohibition of resistance to tyranny: by nature of course one may resist it, but this resistance may be forbidden through human or divine act.

In other words, natural right as such does not recognize prescription, but without prescription of course human life is[8] [impossible]. This is also another sign of the same change. Hence such an atrocious thesis which we have seen, the subjection of the people to an absolute ruler, is by itself perpetual, [by] prescription. And the reasons for prescription [are] the concern with stability and order. Natural right does not have this character here, something[9] to which to appeal from conditions which you regard as[10] [inequitable]. These, I believe, are the points which we must keep in mind. That of course is what leads up to the great revolutionary movement, that you can appeal to natural right, and not only in this particular point, but as it were to that code of natural right which this modern [revision of] natural right[11] developed.

Now let me explain it a bit further. I have spoken of a code of nature,[12] [an idea with whose emergence] Grotius has something to do,[13] [but which we must further develop], the distinction between what is of natural right and what is not of natural right. Now if we have such a code of nature, that means we are liberated from the whole ballast of the past, from all tradition. This is not a man-made code which can be unmade by man. But this thought could be found in classical antiquity as well, and now we come to the particular character of these modern codes of nature. They want to be, for the sake of their solidity and their validity—they want to start from what is effective in all men, *i.e.*, from the lowest, on which you can depend in all cases—from the bare minimum, we can say. Only the bare minimum is the basis of these codes—in a word, self-preservation, from which property and liberty and the other things can easily be shown to follow. The state of nature is the concept in which these things are somehow united, but then the state of nature is, as it appears, a state of absolute misery. It is a state in which there is not yet any human institution, and of course also no divine institution. In other words, what makes life worth living—this is an implication of that—is due to human effort. In the state of nature, we all would be miserable.

The good society as distinguished from the state of nature is a rational construct on the basis of natural right. You start from this bare minimum, like life, liberty, property, what have you, and then you figure out on that basis which order will be most conducive to these. This is the work of your figuring out, the work of human reason, and not given by nature. In a broader and looser sense, you can of course say this order, which is most conducive to the fundamental rights of man, is the most natural order, but this is[14] [only] as loosely expressed.

What these men have in mind can be stated as follows. [LS writes on the blackboard] State of nature—that was somehow at the beginning. And then it[15] [led us] to where we are here—[in] a[16] [radically] imperfect state. In some respects, perhaps, worse than the state of nature.[17] Then we call these actual societies.

What do they do, I mean men like Hobbes, Locke, and Rousseau? They start where the whole thing starts: state of nature. But then this leads to the good society, the construction of it. In other words, we don't need this terrible stuff, this record of human folly and crime called history. We need only the return to the absolutely necessary stages, human nature as it is without any effort, and then we figure out the good society. There is a strict parallel in what could be called the theory of knowledge which was developed at this time. There is a strict parallel to that. One could crudely say that human knowledge consists of two things, of percepts and concepts. Now you have the sense perception, and sense perceptions are of course not enough—they must be organized some way, and that is done by concepts. Now we all have concepts, even the most savage tribe, by virtue of which they organize their[18] [world]. What are these concepts? The concepts are unconscious[19] [productions] of human reason. This corresponds[vi] in fact to what we have here.[20] What we must do now in order to get rid of these popular concepts is to go back to the[21] [percepts]. Then, understanding it properly, being no longer a savage fool with superstition, an enlightened man, we will build up the right kind of society. Similarly, here we are as much dependent on our sense impressions as any savage is, but we will interpret our sense data, not any longer in the light of these popular concepts, unconscious concepts, but in the light of conscious concepts. We supervise the conscious construction: there is nothing dark and fishy about it. The unconscious constructs have come into being without any supervision. No wonder that they are very crude.

I have given this brief survey because I think we must never forget the broader things. Now I have to address—where exactly did we stop last time? We didn't come to the end of our assignment in chapter 12. Let us turn to paragraph 12, section 2.

Reader:

> The Roman law did not establish this rule to apply to every inequality, for it does not follow up trivial differences, it is judged that a multitude of lawsuits would result;[vii] but the rule is applicable in sufficiently important differences, as those which exceed one half of the just price. Beyond doubt, as Cicero says, the laws deal with injustices so far as these can be laid hold of, but the philosophers deal with injustices so far as they can be distinguished by reason and intelligence.

LS: In other words, we have here a reference of Grotius to Cicero, as an authority for something like the distinction between law and morality.

[vi] Strauss is presumably pointing to his blackboard diagram, the horrible state that preceded civil society.

[vii] In original, not "it is judged"; "since it judged."

Reader:

> Those persons, in fact, who are not subject to civil law want to follow the same rule,[viii] which with right reason tells them is fair.[ix] Furthermore, this rule should be observed even by those who are subject to laws whenever the transaction involves what is morally right and blameless, even if the laws do not grant or take away a right, but merely for certain reasons refuse to lend their aid to what is right.[x]

LS: Now let us look up the passage in Cicero, in the *Offices*, Book 3, paragraph 68 and 69.[xi]

Reader:

> What is the purpose of these illustrations? To let you see that our forefathers did not countenance sharp practice. Now the law disposes of sharp practices in one way, and philosophers in another: the law deals with them as far as it can lay its strong arm upon them; philosophers, as far as they can be apprehended by reason and conscience. Now reason demands that nothing be done with unfairness, with false pretense, or with misrepresentation. Is it not deception, then, to set snares, even if one does not mean to start the game or to drive the into them? Wild creatures often fall into snares undriven and unpursued.[xii] Could one in the same way advertise a house for sale, post up a notice, "To be sold," like a snare, and have somebody run into it unsuspecting?
>
> Owing to the low ebb of public sentiment, such a method of procedure, I find, is neither by custom accounted morally wrong nor forbidden either by statute or by civil law; nevertheless it is forbidden by moral law. For there is a bond of fellowship—although I have often made this statement, I must still repeat it again and again—which has the very widest application, uniting all men together and each to each. This bond of unity is closer between those who belong to the same nation, and more intimate still between those who are citizens of the same city-state. It is for this reason that our forefathers chose to understand one thing by[xiii] universal law and another by the civil law.

LS: Where are you now?

Reader: Paragraph 69.

[viii] In original, not "want to follow"; "ought to follow."
[ix] In original, not "which with right reason"; "with right reason."
[x] *JBP*, 2.12.12.2.
[xi] The reading is from Cicero, *De Officiis*, trans. Walter Miller, *Loeb Classical Library 30* (Cambridge, MA: Harvard University Press, 1975).
[xii] Miller's translation: "It is not deception, then, to set snares, even if one does not mean to start the game or to drive it into them? Why wild creatures often fall into snares undriven and unpursued."
[xiii] Miller here inserts "the."

LS: Finish, please.

Reader:

> The civil law is not necessarily also the universal law; but the universal law ought to be also the civil law. But we possess no substantial, life-like image of the true Law and genuine Justice; a mere outline sketch is all that we enjoy. I only wish that we were true even to this; for, even as it is, it is drawn from the excellent models which Nature and Truth afford.

LS: One thing is very clear: that Cicero has here a distinction between (the translation is very[22] [unliteral]) morality and law.[xiv] The case which he has in mind, and which he discusses at greater length later on, is the man who [sold] ruined ramshackle buildings, rich in all kinds of material without having any virtue, no windows, no roof, and advertises them and says beautiful mansion. The honest man will simply take it as practically valueless, and if someone wants to have it for some reason, he will say take it, or maybe give me a dollar, so that we can sign the contract. And then what will the dishonest man do? He will[23] [buy it] for a sum, say, a dollar, and[24] [conceal or deceive] so that the customer will not be aware of the flaws, and will make all kinds of[25] [promises], yes, it will be done as soon as it is feasible . . . and then he will sell it for a very high price. But who has the moral responsibility? This is a difficult situation. Therefore, the law uses crude[26] [logic], and says[27] [fraud can't be proven], and we cannot act like nurses for every man who[28] [is deceived] and lets him[self] be cheated, we can't help it.

So the distinction between law and morality is obviously necessary, and was always recognized by people. But what has nevertheless changed? In the eighteenth and nineteenth century, especially in Germany—I know in Germany because I was brought up there, but I suppose the same thing was also happening in other European countries—one of the great achievements of modern[29] [jurisprudence] is the clear distinction between law and morality.

Look at the discussion about the prohibition problem. The laws regarding gambling, for that matter: here we have things which are incompatible somehow with the continental spirit of modern Europe. What's the difference? In continental Europe, the principle has become the strictest possible limitation to what is[30] [of] harm to others. If you harm yourself,[31] [this is not outlawed]. Well, of course the line is complicated to draw, because the gambling of X doesn't hurt Y but X's family. So there are always these complications. But somehow a principle is found. Take the clearest point, perhaps.

From the older point of view, there would not have been the slightest objection to such things[32] [as] censorship. After all, to see whether a book is indecent, *i.e*., contains obscene expressions or obscene pictures, does not require a very profound mind. Every

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[xiv] The words translated as "moral" in the cited text are *turpe* in the first usage, and *naturae lege* ("natural law") in the second.

normal member of a jury can see that. Or whether it contains incitements to treason, or whatever it may be. Or to disloyalty.

Here, according to the modern point of view, people believe they have discerned a principle which makes possible as [a] universal rule what is called freedom of thought, but which is of course free expression, but this does not as such fall within the province of the human legislator. However this may be, this is underlined in modern development: the discovery of a principle which would allow putting clear limitations on the legislator which he cannot transgress. A simple formula is that morality or virtue is not as such a concern of the legislator. This, of course, Cicero never said. Cicero said it is his concern, but he can only do it in a very insufficient manner, he cannot do it sufficiently by penal law. But [33] [this is simply] no longer the concern of the legislator, and there is where the seventeenth and eighteenth centuries were so helpful, because the issues were clearly drawn. The legislator has to protect, life, liberty, property, against everybody else, and nothing else. Virtue, religion, or whatever there may be, is absolutely not of[34] [legal concern]. You have here a distinction of principle. But the question is: Is this distinction of principle wise? In the case of loyalty, it is clear that loyalty is a concern of the legislator—not only the crude cases of treason, but the general state of disaffection is of the utmost importance to any government and what we call public spirit, which may not be moral virtue in the strict sense in which Aristotle understood it. Surely without it, decent political life is unthinkable. So a clear line is hard to draw, but you insist on it, and there is a clear [line], say, in terms of life, liberty, and property, which is[35] [subject to] legislation and everything else is none of[36] [the legislator's] business.

To come back to the main point, what seems to have happened in modern times is this: not the distinction between law and morality—the passage from Cicero proves that this is not a modern invention, but the belief that there is a clear and distinct principle . . . .

Student: I don't think that you can find that in Grotius either. I think that Grotius is clearly in line with Cicero. It is more a question of what can the law cover.

LS: Sure, yes.

Student: Well then, how, except on the basis of time, can we call Grotius a transition?

LS: But we have seen certain things. Why is he so much concerned with the distinction of natural law, as it were to prepare a code of natural law? Why he is concerned with the strict separation of right—natural right—and the other forms of right, in a systematic manner? Why?

Student: He's a jurist.

LS: But there were other jurists. He is more than a mere jurist. After all, philosophers and theologians played quite a great role in his life. We have discussed this on a former occasion.

Student: He's concerned because he wants to separate out the basic principles of natural law which will be obeyed, and he wants the ones which are not obeyed out of the way.

LS: In other words, the concern with natural right in the strict sense of the term is a concern with that which falls within the province of law as distinguished from morality[37] [in the full sense]. Is that what you mean? Only with this qualification: that for Grotius the sphere of right narrowly understood is of course [only one] part of the sphere of morality.

What is the heading of paragraph 20 of chapter 12?

Reader: "*By what right interest is forbidden*"[xv]

LS: This discussion is very strange. Grotius does not say that usury is not forbidden by the right of nature, as it was thought to be, but he suggests it.[xvi] I think he suggests it. This is not the only case where Grotius tries to hold a very hot iron—the whole religious Christian tradition was against usury. Some exceptions of course, especially in the seventeenth century, but on the whole, and he doesn't speak of it clearly. A few points at the end of paragraph 25 . . . .

Reader:

> In a joint undertaking of ships the common advantage is defense against the pirates;[xvii] sometimes also booty. Ordinarily a value is placed upon the ships and their cargo,[xviii] and from this the total is reckoned, so that the losses which occur, under which the care of the wounded is included,[xix] may be borne by the owners of the ships and cargoes in proportion to the shares of the whole which they possess.
>
> What we have said up to this point is in accordance with the law of nature.[xx]

LS: Beginning of paragraph 26.

Reader:

> In these matters no change seems to have been made by the volitional law of nations,[xxi] with the one exception that, where there has been no falsehood or concealment of what ought to have been said, an equality of

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[xv] *JBP*, 2.12.20.
[xvi] *I.e.*, Grotius suggests in this passage that usury is not forbidden by the law of nature.
[xvii] In original, not "against the pirates"; "against pirates."
[xviii] In original, not "a value is placed up ships and their cargo"; "a valuation is placed upon ships and their cargoes."
[xix] In original, not "under which"; "in which."
[xx] *JBP*, 2.12.25.
[xxi] The word "volitional" is marked inaudible in the transcript.

> terms is considered an equality as regards external acts; [xxii] consequently, as no action of law was allowed against such an inequality by the civil law before the Constitution of Diocletian, though among those who face their association of the law of nations alone no demand or collection of that account is allowed.[xxiii]

LS: Now section 26, paragraph 3.

Reader:

> However, the advantage of introducing the rules which I have mentioned is manifest for the termination of disputes which would be without number; which, furthermore ,[xxiv] would be interminable on account of the uncertain price of things among persons who have no common judge, and which would be unavoidable if persons were allowed to withdraw from agreements on account of inequality of terms.[xxv]

LS: In other words, a consideration which does not belong to natural right proper is that natural right as such does not provide for a competent judge, and the question is how this remedy can be[38] [provided], and that is one of the entering wedges of the law of the right of nations.

Now let us turn to chapter 13, which is of very great importance. At all times and with all peoples, perjury was regarded as a very great crime. What is involved in oaths? The calling down of the wrath of God on the perjurers, and Grotius defends this notion of the wrath of God as a will to hurt. Paragraph 3, the beginning.

Reader:

> But if anyone has deliberately uttered the words of an oath, yet without the attention of swearing,[xxvi] some writers state that he is not bound, and yet that he sins by swearing rashly. It is, however, nearer the truth to say that he is bound to make true the words[xxvii]—

LS: That does not mean it is simply true. The great question is: Is the obligation deriving from oaths an obligation of natural right? In this paragraph we surely do not find an answer. Swearing by God presupposes naturally the truth of God, and could God not

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[xxii] The student's reading of the material quoted from here to the end of this passage contains several deviations from the translation: "consequently, as no action at law was allowed against such an inequality by the civil law before the Constitution of Diocletian, so among those who base their association on the law of nations alone no demand or collection on that account is allowed."

[xxiii] *JBP*, 2.12.26.1.

[xxiv] The words "which, furthermore" are marked inaudible in the original transcript.

[xxv] In original, not "persons"; "men." The word "terms" is marked inaudible in the original transcript. *JBP*, 2.12.26.3.

[xxvi] In original, not "the attention of swearing"; "the intention of swearing."

[xxvii] *JBP*, 2.13.3.1.

mislead, deceive? Let us see paragraph 3, where there is a brief discussion of[39] the [alleged] changes in[40] [divine] decrees,[41] a great difficulty[42] into which we cannot go.[xxviii]

The main point is that all oaths must be kept, even those to pirates and tyrants, in paragraph 15. [First], it is the duty toward God, not toward the pirates and tyrants, and secondly, there is a society of right even with the pirates. The pirate is after all a human being. Let us read paragraph 15.

Reader:

> The principles stated are applicable not merely with respect to public enemies, but to any persons whatsoever. For not only the person to whom the oath is given is taken into consideration, but also God, by whom one swears, and the reference to God is sufficient to create an obligation. Therefore, we must thrust Cicero aside when he says that there is no perjury if the ransom for life, which has been agreed upon and taken under oath, is not paid to pirates, for the reason that a pirate is not entitled to the rights of war, but is the common enemy of mankind, with whom neither good faith nor a common oath should be kept.[xxix]

LS: Let us read paragraph 17.

Reader:

> This, again, must be noted, that when in consequence of some such defect as I have mentioned no right is created for a person, the good faith is pledged to God, no binding obligation rests upon the heir of the man who took the oath.[xxx] For as the property passes to the heir, that is, things bought or sold among men, so also the burdens of the property;[xxxi] but not unlike that are other obligations, to which a person has been subject by reason of a duty imposed by religious feelings, gratitude, or good faith.[xxxii] These obligations do not, in fact, belong to what is in a strict sense called among men a right, I do remember having explained elsewhere also.[xxxiii]

LS: Is the right strictly understood only concerned with intra-human relations? There is a certain ambiguity of the Latin words *inter homines* here in the syntax of this sentence,[xxxiv] but later on surely that was frequently said, that law can have to do only with what affects other people—and therefore, for example, the problem regarding sexual perversion, where no other human beings are involved.

[xxviii] See *JBP* 2.13.3.3-5.
[xxix] *JBP*, 2.13.15.1.
[xxx] In original, not "the good faith is pledged"; "but good faith is pledged."
[xxxi] In original, not "of the property"; "on the property."
[xxxii] In original, not "not unlike that are other obligations"; "not in like manner other obligations."
[xxxiii] In original, not "I do remember having"; "as we remember having." *JBP*, 2.13.17.
[xxxiv] The ambiguity seems to be whether the phrase "right among men" means right dealing only with relations among men.

Now another case he discusses here in paragraph 19: a man swore not to sell his things, but he sold[43] [them]. Is[44] [the sale] valid? Yes, if he only swore not to sell. No, if the oath is understood as an alienation of his right to sell. In the latter case he could no longer sell. This enigmatic paragraph seems to say that oaths of kings and between foreigners do not necessarily have legal significance. That is very doubtful. Let us turn to paragraph 20, at the beginning.

Reader:

> Let us now see what powers are possessed by superiors, that is, by kings, fathers and masters, and also by husbands, so far as conjugal rights are concerned. The act of superiors cannot indeed bring it to pass that the oath does not have to be fulfilled, insofar as the oath was truly binding;[xxxv] for such fulfillment is required by both the law of nature and divine law.[xxxvi]

LS: He says now both: this a matter of natural and divine law. In other words, it is not clearly said, simply and unqualifiedly, that this is a matter both of natural law and divine law. How to draw the line? That is entirely left to you. This makes the question more urgent. To what extent is[45] an oath [binding] at all? Due to natural right strictly understood? In section 4 of this same paragraph . . . .

Reader:

> Again, a human law can remove an impediment, which is placed on acts of a certain kind, if an oath either in general terms, or in a special form, has been added.[xxxvii] This the Roman law did in the case of those impediments which did not have directly in view the public good, but the private advantage is the one taking the oath.[xxxviii] If such a case arises, the sworn act will be valid in the same way that it would have naturally been valid without human law, either by binding good faith only, or also by giving a legal right to another, according to the diverse nature of acts, which has been set forth[xxxix]—

LS: More literally, if this happened, the sworn act would be valid in[46] [the] way[47] it would be valid naturally, prior to or[48] [outside] of human law. This is again a kind of divination of the state of nature[49] [in Grotius]. Oaths are valid by divine law for the reasons which he has given earlier in paragraph 15. A truthful man is believed without oaths; in other words, on a higher level, there is no place for oaths. Precisely those who have the loftiest views[50] [are trustworthy]. But a clear division as to oaths[51] [under] the[52] [divine law, the natural law, and the *ius*] *gentium* is not there, and one would have to consider the whole question of Grotius' theology to settle the question: To what extent is [his] doctrine based on the true teachings of[53] [Scripture], as he interpreted the[54]

[xxxv] In original, not "the oath does not have to be fulfilled"; "an oath does not have to be fulfilled." In the original transcript "binding" is marked inaudible.
[xxxvi] *JBP*, 2.13.20.1.
[xxxvii] In original, not "which is placed on acts"; "which it had placed on acts."
[xxxviii] In original, not "advantage is the one taking"; "advantage of the one taking."
[xxxix] *JBP*, 2.13.20.4.

[Scripture]? To what extent can this be natural law? This is a long question which we are not prepared to answer.

Now let us see. In chapter 14 I did not find anything sufficiently interesting, except perhaps paragraph 6 of chapter 14. This is the chapter on contracts.

Reader: "Among almost all jurists[xl]—"

LS: This is of course still the old question: the distinction between right narrowly understood and a broader and deeper and nobler sense of morality which is not, however, a matter of law.

Reader:[xli]

> Book 3, chapter 54, appropriately distinguishes the three cases just mentioned, and says that what is not due falls under the head of "bounty," which other interpreters of Proverbs 20:28 explain as "overflowing of goodness." In the deeper language what is due according to the strict sense of the law is called "a judgment";[xlii] and what is due in accordance with honor is defined by the Hebrew word meaning justice, that is, equity.[xliii]

LS: And then he tries to find these[55] [same ideas] in Matthew. Now what is here the point? It is not entirely wrong that there is something of the distinction between right in the narrow sense and in the wider sense. [Inaudible] I looked up the passage again, and he surely correctly understood it. It seems to be connected with the question of punishment. Punishment is connected with this sphere of right narrowly conceived, as distinguished from the other point of morality of which he speaks here.

Let us read the next paragraph,[56] [section] 2.

Reader:

[xl] "Among" is not in the translation. "Almost" begins the passage there. The passage is not entered in the original transcript because the tape was changed at this point. Here is the quoted material as translated:

"Almost all jurists believe that the contracts, which a king enters into with his subjects, are binding upon him by the law of nature only, and not by municipal law.

"This is a very obscure way of speaking. For legal writers sometimes improperly speak of a natural obligation as referring to that of which the fulfilment is by nature honorable, although not in reality due, as the payment of legacies in full without the deduction allowed by the Falcidian Law, the payment of a debt from which one had been freed by a criminal penalty inflicted on the creditor, or the requiting of a favor with its like, acts of which none permits of an action to recover anything unjustly paid. But sometimes the words are more properly used with reference to that which does in truth bind us, whether the other party has acquired a right therefrom, as in contracts, or has not acquired it, as in a full and firm promise." *JBP*, 2.14.6.1.

[xli] "The Jew Maimonides, in his *Guide of the Perplexed*" begins the selection in Grotius.

[xlii] In original, not "the deeper language"; "the Hebrew language."

[xliii] *JBP*, 2.14.6.1.

> According to civil law also a person can be said to be bound by his own act, either in this sense, that an obligation results not from the law of nature alone but from the municipal law, or from both together, or in the sense that the obligation gives a right to action in the court of law. Therefore we say that the true and proper obligation arises from a promise of contract of the king, which he has entered into with his subjects. This obligation confers a right upon his subjects; such as the nature of promises and contracts as we have shown above; and this holds even between God and man.[xliv]

LS: In other words, man can raise claims against God on the basis of divine promise, but he said this rather in passing and not in accordance with the importance of the matter.

Reader:

> Now if the acts are such as may be done by a king, but also by anyone else, municipal law will be binding in his case also; but if they are acts of the king as king, municipal law does not apply to him. This distinction has not been observed with sufficient care by Vazquez[xlv]—

LS: The Spanish scholastic to whom[57] [Grotius] refers[58] frequently, and who takes a more constitutional view than Grotius with his half-inclination toward Bodin.

Reader:

> Nevertheless, from both these acts legal action may arise,[xlvi] at least so far as the rights of the creditors may be declared;[xlvii] but compulsion cannot follow on account of the position of the parties with whom this business is conducted,[xlviii] for it is not permissible for subjects to compel the one to whom they are subject; equals, however, by the law of nature, have this right against equals, and superiors against inferiors even by municipal law.[xlix]

LS: No[59] [charging of] crimes against the king; that's all. But how is this provided for today, where no one has the view that Queen Elizabeth[60] [can] just shoot one of the subjects, and it would be a very interesting legal case. But how has this been taken care of in legal practice in England—[61] [the principle of] no crimes against the king—I mean after some legal restriction was put on the king. That is, I think, a distinction between the private person and the public person. There must be[62] [some provision] made for the

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[xliv] Kelsey's translation: "Therefore we say that a true and proper obligation arises from a promise and contract of a king, which he has entered into with his subjects and that this obligation confers a right upon his subjects; such is the nature of promises and contracts as we have shown above; and this holds even between God and man." Grotius, *Law*, 2.14.6.2.

[xlv] "Vazquez" is marked inaudible in the original transcript.

[xlvi] In original, not "legal action"; "a legal action."

[xlvii] In original, not "as the rights of the creditors"; "as that right of the creditor."

[xlviii] In original, not "this business"; "the business."

[xlix] *JBP*, 2.14.6.2.

private debts of the king, only debts of the king in private terms. You had a great difficulty when you discussed that . . . .

Student: It seemed to me that Grotius was saying—that Grotius almost defines the distinction away to nothing. He says there is a difference between the private and the public person and the king, but that no practical results follow except that the king has done a moral wrong if he takes away rights unjustly.

LS: Good. But the distinction, you will admit, is necessary. Look at this everyday occurrence. The king is in his castle, and then says something, kill that fellow and then one of his companions kills him. Can he[63] plead that he only obeyed his sovereign's order? No, therefore some formality[64] [is required], a formal signature of the king, and other things in order to prevent that any momentary whim of the king be construed as a command, even in an absolute monarchy.

Student: [Inaudible] isn't it true that nothing is done against the king?

LS: Even in absolute monarchies, of course it is [im]possible to do anything against the king, [even for] private crimes.

Student: [Inaudible] just crimes.

LS: No, of course not. The only thing to do when you are confronted with a[65] [tyrant] is to assassinate him. Either from the point of view of the civil law or from the absolute monarchy, it is clearly a high crime, but from the point of view of natural law [it is] a just action, if it is true [that he is a tyrant]. That is one of the reasons for speaking against absolute monarchy or anything like it. It is perfectly clear that a man like Stalin, in addition to his political crimes, could have committed any private crime. You know there was a story of Hitler and the killing of a girl—it may only have been a rumor, but assuming this was a fact, how could this have possibly led to prosecution? It is impossible. Once you have absolute monarchy or tyranny, then you can make a distinction—and you must somehow make it for very important purposes—between what he says in disgust and whether he means it, for the very practical reason in which he himself is interested, but you cannot do anything about it if he committed a common crime. It is absolutely impossible to do anything about it.

Student: It was my idea that any action taken inside or outside [the law] would be unjust, even as you mentioned in the case of assassinating.

LS: But still, I made a distinction: assassination is clearly a crime according to the law laid down. As long as the judicature is under control of the tyrant, they will of course condemn that poor fellow to death, but from a deeper and broader point of view, they can say this man liberated his country from a terrible thing.

Student: This is just?

LS: Yes, just. I have no explanation, but as long as absolute monarchy was recognized as a possible, as a decently possible regime. We know that Locke denied it in a very impressive manner, but ordinary people in the seventeenth century granted that there could be, and the[66] [pressing] question was, for most of them: Is their country an absolute monarchy? There is no way out. But the distinction between public and private is of course also necessary in property matters: to distinguish between what belongs to the[67] [state] and what belongs to the royal family. The dowry of his daughter: Is it the business of the state to provide for that, or is it something which he has to do from his funds? And there are many other matters.

I can only say that I do not understand your criticism of Grotius. As I understand it, I think it is unfounded because there is no other solution possible. You commit an absurdity only when you go so far as Hobbes goes and take in the case of the king—the king can never commit an unjust action, as Hobbes says, because an unjust action is an action against the law, and the king is by definition above the law. This is of course a very narrow view. Hobbes admits, therefore, that he can commit inequitable acts. Well, I would say that is truly a verbal question, since if the king, without any good reason and just because he doesn't like a certain man's beard, shoots him down, everyone would say it is a terrible thing. If he lays down a very exacting tax or something of this kind, then there is at least the question that it might be good for the society. Grotius does not go so far.

Student: Grotius' position did amount to the fact that while the king could do something unjustly, nobody could assert a right against him justly.

LS: Look at the situation in an absolute monarchy. As long as you have an earthly authority higher than the king, say, the pope, then the situation is different because then the pope or some other court could call the king before them. That's different. But to that extent one could also say that if there is a spiritual authority, the monarchy cannot be unqualifiedly absolute. The medieval expression for what we now call sovereignty was someone or a society not recognizing a superior. But every Catholic absolute monarchy by definition recognizes a superior, the pope. But of course Grotius is a Protestant, writing about his country, and that's different. There was a whole galaxy of Protestant absolute rulers.

What would happen if the prince's consort . . . . Fortunately,[68] [it is impossible that] Queen Elizabeth would do anything in the slightest way improper, so we don't have to worry about that. But what would—was there any case in the[69] [text]?

Student: I thought about the abdication of . . . .

LS: I thought of it, but this was technically no crime. It can be done. It was something which was regarded as improper by an important part of the British population, and without any judicial [proceeding]. God forbid, if Queen Elizabeth would suddenly dance

the twist in public . . . which would be disapproved by a large majority of the British people.

Now let us turn to chapter 15. Let us read the beginning.

Reader:

> Ulpian divided conventions into public and private.[l] Public conventions he explained, some things,[li] by definition, but by giving examples. His first example is the convention "which is arranged in time of peace"; and second, "What the generals in command in a war conclude certain agreements with each other."[lii] Ulpian, then, understands then that public conventions are such as can be made only by the right of higher or lower authority of government;[liii] and in this respect they differ not only in respect to the contracts of private persons,[liv] but also in the contracts of kings which are concerned with private affairs.[lv]
>
> However, from such private contracts also causes of war are wont to arise, although more frequently from public contracts. Having, therefore, sufficiently treated compacts in general,[lvi] we ought to relate some details which relate to this more excellent kind of decree.

LS: Are promises obligatory where [an enemy of religion will be aided]? "'Those who are treacherously attacked as we are by the Athenians ought not to be looked upon with disfavor if they seek safety not only in the aid of the Greeks but also in that of the barbarians.' No right whatever is sufficient to warrant committing what will probably be harmful to religion, indirectly, if not directly. For as a matter of first importance, the kingdom of heaven is to be sought, that is, the spread of the gospel."[lvii]

Take a case which came about in Grotius' lifetime, but after the first[70] [publication] of the right of war and peace, the alliance between the French king and the Turks against the house of Austria and Spain which is here very relevant.[lviii] You see also the use of Thucydides in this question is quite strange. He is not a church father. What Grotius

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[l] "Ulpian" is marked inaudible in the original transcript.

[li] In original, not "some things"; "not, as some think." The words "some things" are marked inaudible in the original transcript.

[lii] Kelsey has "and the second, 'When the generals in command in a war conclude certain agreements with each other.'"

[liii] In original, not "understands then that public conventions"; "understands that public conventions." The words "Ulpian, then" are marked inaudible in the original transcript.

[liv] In original, not "in respect to the contracts"; "in respect from the contracts."

[lv] In original, not "in the contracts of kings"; "from the contracts of kings."

[lvi] In original, not "of compacts in general"; "compacts in general." In the translation the selection concludes "we ought to add some details which relate to this more excellent kind of agreement."

[lvii] Strauss is quoting Grotius (2.15.11.2), who is here quoting from Thucydides (*History* I.82). It is possible that this was read by the reader and erroneously attributed to Strauss in the original transcript.

[lviii] The French alliance with the Ottoman Turks was undertaken in 1536 and renewed numerous times.

suggests throughout this passage is that the distinction between Christians and pagans or infidels has a certain kinship with the Greek distinction between Greeks and barbarians, and to that extent he can use Thucydides; that makes sense.

The end of paragraph 12.

Reader:

> To this common cause, therefore, all Christians ought to contribute men or money, according to their strength. How they can be excused from making such a contribution, I do not see, unless they are kept at home by an unavoidable war or some other equally grievous misfortune.[lix]

LS: So that's against the Turks. One more point in this chapter, and that is paragraph 16, [section 3] at the end, and the beginning of section 4.

Reader:

> Moreover, it was the current opinion of those times that even a wife could be lawfully pledged as security.[lx]
>
> Among us who hold a different opinion, I think that in such a sponsion first the property is liable up to the amount of the loss; and if that is not sufficient, then the person is subject to slavery.[lxi]

LS: But it is not made clear here in this section what natural right says of this pledging. Now a few words about chapter 16—in the beginning, the natural right about the interpretation of promises, and regarding the coercion of the promissor by the promissee. Will you read that?

Reader:

> If we consider only the one who has promised, he is under obligation to perform at his own free will, that to which he wished to bind himself. "In good faith what you meant, not what you said, is to be considered," says Cicero. But because internal acts are not of themselves perceivable, and some degree of certainty must be established, lest there should fail to be any binding obligation, in case everyone could free himself by inventing whatever means he could wish, natural reason itself demands that the one to whom the promise has been made should have the right to compel the promisor to do what the correct interpretation suggests. For otherwise the matter would have no outcome, a condition which is morals is held to be impossible.[lxii]

LS: There cannot be an open question in moral matters. It cannot remain open: it must be decided. This necessary terminability is essential to the whole discussion. This does not

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[lix] *JBP*, 2.15.12.
[lx] In original, not "a wife could be pledged"; "a life could be pledged."
[lxi] The word "sponsion" is marked inaudible in the original transcript. *JBP*, 2.15.16.3-4.
[lxii] In original, not "which is morals is held"; "which in morals is held." *JBP*, 2.16.1.1.

necessarily mean that the decision which is reached is the wisest decision, but it must have a decision.[71] [Inaudible] has a nice formulation for that—I do not remember it exactly—well, business does not [inaudible] wait[lxiii]—I mean, if we are concerned with the theoretical discussion, this can go on and on and on, and if it is not decided, then we have not yet reached the clarity required and we must leave it open. But in practical matters, it must be decided—how did he put it so nicely?—otherwise, the affair would not have an end [or] exit to it, which in moral things is regarded more importantly. It must be possible to decide it. One decision of course can be this: the thing is dubious, and we therefore don't do it. But a decision there must be.

The infinity of theory and the necessary finiteness of practice is of the utmost importance. An *exitus* can be good and bad,[72] [but in any event] it must have an outcome.

There is a Platonic presentation of this issue in the dialogue called[73] [the *Laches*]; a fellow has discovered a new kind of fighting and comes to Athens and is willing to sell it. Two experts they ask: Should one learn this thing or should one not? The experts[74] disagree. So then the whole thing is returned, as it were, to the non-expert Socrates who has heard and seen the spectacle. But he cannot decide that; he must first try to settle some previous questions. You assume that he fools these fools into agreeing that they recommended this method of fighting in order to make the people more courageous, whereas what was[75] [intended] was to make them better killers, which is not the same thing, obviously. So you want to make them more courageous, but how can you make people courageous if you do not know what courage is? So what is courage? So then a discussion begins and it leads to[76] [an impasse], and then at the end they go home, and the whole practical issue is completely forgotten. Any benefits anyone could have derived from it—probably none of the participants but some of the people who listened in—was to learn something about courage, and not about this method of fighting. Now if you look at it from a practical point of view—let us assume it was a useful invention for war, or possibly a useful invention for war—it would have been impossible to leave it at that. A decision would have been reached, because even if a decision had been postponed,[77] in practical matters [that too is] a decision, to table it. In theoretical matters it is not a decision. I believe the mixing up, the believing that theoretical suspense is a decision, is underlying much of present-day discussion.

If I am not mistaken, that is the only case in the Platonic dialogue where[78] [it is a matter a of whether a practical measure should be taken]. Should two Athenian citizens learn this fighting technique or should they not: this is never discussed, it is postponed[79] [indefinitely], as the Romans say . . . .

In chapter 16, let us look at the beginning of paragraph 12.

Reader:

In the light of the principle stated, the following rules should be observed:

[lxiii] The transcriber typed "Work" as the source of this quote, which is clearly an error. It is tempting to think Herman Wouk was intended, but I can find no quote by Wouk to this effect, nor have I been able to reconstruct the quote itself.

> In agreements that are not holiest,[lxiv] the words should be taken for their full meaning according to current usage; and, if there are several meanings, that which is broadest should be chosen, just as the masculine gender is taken for the common gender, and an indefinite expression for a universal. Thus the words, "from which one has been ejected," will have reference even to the restoration of one who has been hindered by force from entering into possession of what belongs to him; the expression, taken more loosely, has that force, that Cicero rightly maintained in his arrangement for *Aulus Caecina*.[lxv]
>
> In more favorable agreements, if the speaker knows the law or avails himself of the advice of lawyers, the words should be taken rather broadly, so as to include even a technical meaning, or a meaning imposed by law. But we should not have recourse to meanings that are plainly unsuitable, unless otherwise some absurdity or the uselessness of the agreement would result. On the other hand, words are to be taken even more strictly than the proper meaning demands if such an interpretation shall be necessary in order to avoid an injustice or absurdity.[lxvi] And even if there be no such necessity, that there is manifest fairness or advantage in the restriction, we ought to confine ourselves to the narrowest limits of the proper meaning, unless circumstances persuade to the contrary.[lxvii]

LS: Go on further, please.

Reader:

> In odious agreements, even figurative speech is sometimes admitted, in order to lighten the burden.[lxviii] Consequently, in the case of a donation, as in the surrender of one's right, no matter how general the words are, they are ordinarily restricted to the matters which were in all probability thought of.[lxix] In such cases that will sometimes be understood to have been taken possession of which there may be hope of being able to retain. Thus, the promise of auxiliary forces by one party only will be understood to be an obligation at the expense of the one who acts.[lxx]

LS: The beginning of the next paragraph.

Reader:

[lxiv] In original, not "holiest"; "odious."
[lxv] Kelsey has "as Cicero rightly maintained in his oration *For Aulus Caecina.*" The title of that work is marked inaudible in the original transcript.
[lxvi] In original, not "an injustice"; "injustice."
[lxvii] In original, not "that there is manifest fairness"; "but there is manifest fairness." *JBP*, 2.16.12.1-2.
[lxviii] The words "odious" and "lighten the burden" are marked inaudible in the original transcript.
[lxix] In original, not "as in the surrender"; "and in the surrender."
[lxx] In original, not "acts"; "asks for them." *JBP*, 2.16.12.3.

> A notable question is, whether under the term "allies" only those are excluded who were allies at the time of the treaty,[lxxi] or also future allies, as in the treaty between the Romans and the Carthaginians after the war in regard to Sicily: "The allies of these people[lxxii]—"

LS: The present allies or any allies they might[80] [acquire]. Let us turn to section 2 of the same paragraph.

Reader:

> One does not permit the move[lxxiii] to the Romans, then, to admit the Saguntines to an alliance, or to defend them after they had been admitted?[lxxiv] Certainly it was permissible, not indeed by virtue of the treaty, but according to the law of nature, which had not been renounced in making the treaty.[lxxv]

LS: This is like the case of Thucydides, near the beginning of the[81] [war between the Spartans] and the Athenians. The[82] [Corcyreans], being a colony of Corinth,[83] come to Athens and say they want to become the ally of Athens in order to protect themselves against their mother city. The Athenians are perfectly free to accept as many new allies as they want. Now these new allies are already practically at war with Corinth and might involve therefore Athens in a war with Corinth. This is a complication in the situation.[lxxvi]

The interesting thing from a general point of view is this:[84] there arise these interesting borderline cases where you cannot possibly say, with full clarity, X or Y or who broke the treaty. Therefore, the question of[85] [which party in the] war is just cannot be[86] [clearly] settled. This is the issue which comes up more than once, but which Grotius avoids. He refuses to draw the conclusion that there could be a war which is just on both sides. This is the latest solution, I think the now-prevalent solution, at least before the Second World War.[87] Modern international law abandoned the notion of just war on this ground, because of the practical impossibility of distinguishing between[88] just and unjust war.[89] [In] the case of the Second World War, Hitler's insanity was so grotesque that it was easy to reintroduce it because almost all laws which were regarded[90] [as binding] were broken. But otherwise the view prevailed that there can be a war which is just on both sides: in other words, the concept of the just war does not make sense. It can be practically disregarded. This was the work of Hobbes, that in the state of nature there is no possibility to speak of just or unjust because there is no possibility of a tribunal. Every tribunal consists either of other states, or of citizens of other states, and [these] are concerned with the national interest of their state. You cannot find a neutral[91] [mediator],

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[lxxi] In original, not "only those are excluded"; "only those are included."
[lxxii] In original, not "these"; "each." *JBP*, 2.16.13.1.
[lxxiii] "One does not permit the move" does not begin the passage in the translation. "Was it not permissible" begins the passage.
[lxxiv] "Was it not permissible to the Romans" is Kelsey's translation of the first words of the selection. "Saguntines" is marked inaudible in the original transcript.
[lxxv] *JBP*, 2.16.13.2.
[lxxvi] This incident is discussed in Thucydides, *History* I.24-55.

as you can when some one of you engages in a major or minor crime. Ordinarily the jury and the judge are really impartial, because they are not involved in it. [When it comes to war, however,] in principle it is impossible to find anyone who is not partial. This was very crudely stated in modern times [in] the reasoning against just war—I mean that just war could then be defined only in limited terms, like rules of war for instance, say, [the use of] poison gas, or shooting [prisoners of war] or this kind of thing. But not the question of the origin of the war.

Needless to say, a question which will come up later: What about the simple fellow who is drafted into an army—how can he possibly be a judge of the justice of the war? If the[92] [cause] of war[93] [has] any complication, has he studied the[94] [relevant] papers? [He may consider only] procedural things rather than substantive—like Pearl Harbor: no [prior] declaration of war. It is to that extent unjust. But the rule which came to the fore in my lifetime is that[95] [the status quo is to be respected], without going into the pre-history of the war, i.e., the freezing of a certain situation, boundary, or whatever—any violent change of that is impossible. It makes more sense if the status quo is fundamentally just; then you can say that every state [that begins a war] breaks the law. But you get these hopeless twilight situations. The most interesting developments in the last decades were not so much foreign wars as internal[96] [conflicts]. You know, some benevolent government sends some weapons to some oppressed citizens of this country and they make a civil war. In other words, the progress achieved by the simple[97] [banning] of wars [of] aggression,[98] aggression [simply] meaning who begins a war. Whether this is unqualified progress is really questionable, because it must be measured against the other forms of war and warfare which today have become very important and which were not sufficiently thought of in the modern tradition.[lxxvii]

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[1] Deleted “honorous.”
[2] Deleted “honorous.”
[3] Deleted “[inaudible].”
[4] Deleted “responsible.”
[5] Deleted “[inaudible].”
[6] Deleted “and.”
[7] Deleted “[inaudible].”
[8] Deleted “[inaudible].”
[9] Deleted “or no longer.”
[10] Deleted “inequitous.”
[11] Deleted “division.”
[12] Deleted “which is an idea emerging with which.”
[13] Deleted “with a concern to follow up.”
[14] Deleted “not.”
[15] Deleted “left [inaudible].”
[16] Deleted “[inaudible].”
[17] Deleted “[inaudible].”
[18] Deleted “[inaudible].”
[19] Deleted “[inaudible].”
[20] Deleted “[inaudible].”
[21] Deleted “[inaudible].”

[lxxvii] Judging from the context, Strauss has in mind the “proxy” wars of the Cold War, in which the West or the Soviet bloc provided weapons to insurgents in the other’s sphere of influence to spark or inflame ideologically-motivated guerilla wars.

[22] Deleted “unliterary.”
[23] Deleted “fight.”
[24] Deleted “[inaudible].”
[25] Deleted “promissories.”
[26] Deleted “[inaudible].”
[27] Deleted “[inaudible].”
[28] Deleted “[inaudible].”
[29] Deleted “[inaudible].”
[30] Deleted “in.”
[31] Deleted “[inaudible].”
[32] Deleted “like.”
[33] Deleted “simple to say these are.”
[34] Deleted “[inaudible].”
[35] Deleted “such.”
[36] Deleted “his.”
[37] Deleted “fully understand.”
[38] Deleted “avoided.”
[39] Deleted “that. Here the discussion is limited to.”
[40] Deleted “these.”
[41] Deleted “and therefore to that extent there is.”
[42] Deleted “here.”
[43] Deleted “it.”
[44] Deleted “it say.”
[45] Deleted “the binding of.” Moved “binding.”
[46] Deleted “this.”
[47] Deleted “in which.”
[48] Deleted “on this side.”
[49] Deleted “[inaudible].”
[50] Deleted “[inaudible].”
[51] Deleted “are.”
[52] Deleted “[inaudible].”
[53] Deleted “[inaudible].”
[54]Deleted “[inaudible].”
[55] Deleted “[inaudible].”
[56] Deleted “paragraph.”
[57] Deleted “[inaudible].”
[58] Deleted “to.”
[59] Deleted “[inaudible].”
[60] Deleted “will.”
[61] Deleted “[inaudible].”
[62] Deleted “something.”
[63] Deleted “only.”
[64] Deleted “[inaudible].”
[65] Deleted “[inaudible].”
[66] Deleted “passing.”
[67] Deleted “[inaudible].”
[68] Deleted “[inaudible].”
[69] Deleted “last.”
[70] Deleted “application”
[71] Deleted “work.”
[72] Deleted “and therefore.”
[73] Deleted “[inaudible].”
[74] Deleted “are habitual; they.”
[75] Deleted “[inaudible].”
[76] Deleted “[inaudible].”

[77] Deleted “it is.”
[78] Deleted “a practical measure, here now, should be [inaudible].”
[79] Deleted “indifferently, as the Romans say [inaudible].”
[80] Deleted “require.”
[81] Deleted “[inaudible].”
[82] Deleted “[inaudible].”
[83] Deleted “and then they.”
[84] Deleted “Then.”
[85] Deleted “whose.”
[86] Deleted “justly.”
[87] Deleted “but I think the.”
[88] Deleted “the.”
[89] Deleted “This is.”
[90] Deleted “[inaudible].”
[91] Deleted “medium.”
[92] Deleted “course.”
[93] Deleted “is.”
[94] Deleted “[inaudible].”
[95] Deleted “[inaudible].”
[96] Deleted “charges.”
[97] Deleted “[inaudible].”
[98] Deleted “warful.”

Session 8: October 29, 1964

Leo Strauss: You recalled Locke's claim that his doctrine—according to which, in the state of nature, everyone is the executioner of the state of nature—is "strange,"[i] and you say this claim must be qualified[1] in light of what you have read in Grotius. But still, since Locke is extremely reticent in raising claims to novelty—not like Hobbes—and he is a very sober man, is there not a difference nevertheless between him and Grotius which entitles him to make this claim?

Student: The first point is that Locke's conception is tied very much to the state of nature.

LS:[2] [That] is one way of putting it, but it is of course somewhat enigmatic, because then we would have to find out the full implication of the concept of the state of nature. But what is the reason which Locke gives [for] why everyone must be, in the state of nature, the executor of the[3] law of nature?

Student: The right to self-preservation.

LS: Yes, but that is a very complicated deduction. A more simple one . . . . I speak from memory. Is this not the reason given by him: the law of nature would be in vain if there were not anyone to execute it. This is the reason which is absent from Grotius. Now the implication of Locke of course is that there is no divine function. One has to consider the great work *On*[4] *[Human] Understanding* and see what Locke says about the conscience. He questions the conscience in the traditional sense—he doesn't use such strong expressions as Hobbes does, but he means the same thing.[ii]

But the law of nature might be in vain . . . while there might be agreement between Grotius and Locke regarding the point of everyone being the executioner, you have seen that Grotius has some qualifications. The executioner must at least be better than the executed, at least in this particular respect. The executor might have committed rape, but not murder; then he can judge a man who murders. The little qualifications are of course absent in Locke, but the key point is the reasoning behind it. There must be a known and knowable executioner. That is the point.

But I didn't quite follow your lengthy discussion about the difference between Grotius and Hobbes. You quoted a passage from the *Leviathan* in which Hobbes speaks of sin, and I believe you simply equated it with Grotius' statement about *peccata*.[iii] But when

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[i] Strauss responds to a student's paper, read at the beginning of the session. The reading was nost recorded. Locke, *Second Treatise*, § 9.

[ii] Locke, *Essay Concerning Human Understanding*, Book 1. Locke denies there are any innate ideas, including ideas of right and wrong.

[iii] *Peccatum* in Latin may mean a simple error, as well as a moral fault, crime, or sin. It was adopted by the Christian Latin tradition as the word for sin.

Hobbes speaks of sin, he always makes the distinction between sin and crime. Now restate your point.

Student: Grotius would hold thoughts accountable to the law . . . .

LS: No.

Student:[5] [If] it's not true that he does,[6] one could make a comparison on that account between[7] [him] and Hobbes, because Hobbes also would not hold thoughts accountable[8] [as] a crime.

LS: How can the human judge know it? The human judge can know it only by what witnesses say, and the witnesses can only have heard the accused say something. I think in this respect I don't see any difference. Now what was the burden of your statement on this subject? On the difference between Grotius and Hobbes?

Student: Although they arrived at the same conclusion, it was not from the same base: Grotius would still not reject the traditional grounds.

LS: That is surely a fair statement. I was glad that you speculated on the reason why the law regarding [civil] litigations and the law regarding[9] [criminal punishments are combined]—I find them two wholly unconnected subjects and [yet they] are brought together by Grotius. We will go into that later.

And the last point . . . when Grotius takes issue with Aristotle regarding punishment and penal law, what is the upshot of the discussion? Does he not have anybody coming down with some hemming and hawing on Aristotle's side?[iv] I mean that penal law belongs to commutative justice.[10] [Expletive] justice has the same meaning as commutative justice. The case is this: in buying and selling, you exchange the merchandise for money, and in the case of punishment according to Aristotle there is also an exchange of damage; and here in this case of course criminal damage, not civil damage, and punishment.[v] Therefore there is a possibility of understanding penal law in terms of exchange, *i.e.*, of the contract. I think it ultimately boils down to this, and the difference is not so radical.

Before we turn to our subject, I would like to deal with the paper of _____,[vi] and it deals with the Prolegomena and therefore with our whole starting point. I cannot go into everything. Grotius is therefore suggesting, Mr._____ says, the primacy of the law of nations to all law, since justice belongs primarily to this law. What do you say to this [statement that] justice belongs primarily to the law of nations? What is the locus of justice primarily, according to Grotius? Natural. So this cannot stand. And here in a

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[iv] The thrust of this seems to be, "does anyone see anything problematic about this interpretation of Aristotle?"

[v] Aristotle, *Nicomachean Ethics* V.4. Grotius introduced the term "expletive justice" as an explicit equivalent to Aristotelian "contractual" justice at I.1.8.1; he recurs to this usage in his treatment of punishment (Bk. II, chap. 20), which is evidently the topic of the student's paper.

[vi] No name was included by the original transcriber.

discussion of section 6, Mr. _____ says that Grotius distinguishes between traits peculiar and traits characteristic to man. I haven't understood that. There are traits which men share, and then there are traits which are characteristic to man, *i.e.*, peculiar to [one] man. I could not follow that.[vii]

[To the author of the paper]: What is the issue between Grotius and Carneades? It is very obvious; Grotius has made it very obvious. One says yes and the other says no to exactly the same question: Is there natural right? Carneades: No, Grotius: Yes. Grotius contends that if you take Carneades' view, then this would lead to what we now call nihilism, or complete moral confusion. That is the simple issue. Carneades surely denied natural right, that is the key point; and he was the most famous representative because Cicero had used his doctrine and this was taken over by Augustine. Would there be today, say, the sophists, the Western tradition [inaudible]? Carneades was a different man; he was in the Academy a couple of generations after Plato.[viii]

Now we have a leftover, if that is the proper term, from last time at the end of the chapter on interpretation. Paragraph 16, the beginning. The context is interpretation, how to interpret pacts, treaties, etc.

Reader: "*What compacts are to be considered personal*[ix]—"

LS: Personal meaning bound up with the person who made it, and not bound up with the things, regardless of who the owner of the things is.

Reader:

> To this topic is to be referred the question which frequently arises in regard to personal and real compacts. If indeed an agreement has been made with a free people, there is no doubt that what has been promised is in its nature real, because the subject is a permanent thing.

LS: In other words, the people is not a [mortal] person; that's the implication.

Reader: "Further, even if the condition of the state shall be changed into a kingdom—"

LS: The "condition [of the state]" is[11] *status civitatis*: the state, statehood, of the commonwealth. You know our word state, which we use with such matter of course—originally, you had to add something—status of your body—*status republica*, the state of the commonwealth, and which means in Greek, *politeia*, the regime. Now look what happened. We dropped this—it was already dropped by the time of Machiavelli—and then this state which is left over is of course entirely neutral to the difference of regime. But how long it took before the term became accepted—I read somewhere that Queen Elizabeth I didn't like to hear of the state because of the "republican" implication.[12]

[vii] The reference is apparently to Prolegomena, 6.

[viii] Grotius discusses Carneades in Prolegomena, 5, 16-18. Strauss discusses this in session 1.

[ix] *"What compacts are to be considered personal, and what real, is set forth, with distinctions"* is Kelsey's translation of the complete title of the heading. *JBP*, 2.16.16.

Reader:[x]

> Even if the state of the commonwealth[xi] shall be changed into a kingdom, the treaty will continue, for the reason that, although the head has been changed, the body remains the same; and, as we have said above, sovereignty,[xii] which is exercised through a king, does not cease to be the sovereignty of the people. An exception will have to be made if it is apparent that the cause of the treaty resided in the free state of the commonwealth—

LS: The state was peculiar to that *status*, namely, republican, because it was a republic.

Reader: "Such would be the case if free states had made a treaty for the purpose of protecting their freedom."[xiii]

LS: Isn't it wonderful that, say, a treaty between the United States and South Vietnam ceases to be valid if, God forbid, South Vietnam would become communist? Because the treaty was made in order to keep South Vietnam free. It is an interesting passage.

One could open up this whole issue of the Aristotelian notion of the regime. The body remains the same, only the head is changed. "Only the head is changed," Aristotle would say,[13] isn't that the most important part of the thing? Which would be rhetorically decisive against Grotius.

Grotius implies as a matter of course that there is no higher right of republics than of kingdoms. [Inaudible] discussing the case of an alliance between various monarchic states in the interest of monarchy—think of the Holy Alliance[xiv]—and then say one of these[14] [states], say, Russia, should become republican—well then of course the Holy Alliance would lose its meaning. But it is interesting that Grotius looks at it only from this angle and not from the opposite. This is not due to a monarchic[15] [bias], but to the[16] [fact that] the chances that a European state would be republican were much smaller than if the state would be a monarchy.

Later, in section 4 of the same paragraph, he has a polemic against Bodin. Bodin simply means here the most respectable representative of the modern school of absolutism—I mean, in other words, what Hobbes did in a more complete way. Now the second part of section 4.

Reader:

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[x] "Further," is the first word of the passage in the translation.
[xi] Following Strauss's suggestion, the reader now substitutes "state of the commonwealth" for "condition of the state."
[xii] In original, not "sovereignty"; "the sovereignty."
[xiii] *JBP*, 2.16.16.1.
[xiv] The "Holy Alliance" was formed in 1815 among Russia, Austria, and Prussia in the aftermath of the Napoleonic Wars, as a conservative bastion against revolution.

> Least of all should the argument of Bodin be admitted, that treaties do not pass to the successors of kings, for the reason that the force of an oath does not go beyond the person. It is true enough that the obligation of the oath can bind the person only, while the promise itself can bind the heir.
>
> Furthermore, the assumption on which Bodin proceeds, that treaties are based on an oath as a kind of foundation, is not valid. The fact is that in most cases it is sufficient binding force in the promise itself,[xv] and that the oath is added thereto in order to secure the enforcement of greater religious scruple.[xvi]

LS: This might, by the way, be helpful for the understanding of the chapter on oaths. Since Grotius admits that the oath binds only the present sovereign, and is in this sense strictly personal, that he wishes to put [treaties] into natural law as much as possible, on a basis independent of oaths, i.e., pacts and promises should suffice. Paragraph 17 in the same chapter.

Reader:

> A treaty entered into with a king surely continues, although the king himself or his successor has been expelled by his subjects in the kingdom. The right to the kingdom, in fact, still belongs to him, although he has lost possession. In this connection the words of Lucan about the Roman Senate are pertinent; "Its rights the order never lost by change of place."[xvii]

LS: What is the practical meaning of such a contract which remains intact after the king has lost[17] power? For example, if the king promised help in case of attack on state A, well, if the king is no longer there, what is the meaning of this? It was in connection with this paragraph that I noted that he does not mention the case of attack meant to preserve monarchy. Perhaps this is the implication, come to think of it, that if there is an alliance of monarchs to maintain themselves in power—that may be it, come to think of it—then the others are obliged to restore it. What is important is not the[18] [obligation] after the[19] king [is removed], but the benefits.[xviii] Then it makes sense.

Student: Isn't it also justified on the grounds that you have to have territorial units or integrity about which you can make laws, and the only way to maintain those territorial units with some integrity would be that they continue even though the regime may alter?

LS: This, I believe, is not the point here. I think the key point is this: the right of[20] [sovereignty] remains with the deposed king. In other words, no ally of[21] [the] deposed king can say: Well, you are no longer ruler. So contrary to what I had said before, I am now inclined to say that he did consider the Holy Alliance or something like that, an alliance of kings for support.

[xv] In original, not "it is sufficient"; "there is sufficient."
[xvi] In original, not "enforcement"; "reinforcement." *JBP*, 2.16.16.4-5.
[xvii] "Lucan" and "Senate" are marked inaudible in the original transcript. *JBP*, 2.16.17.
[xviii] The point seems to be that such an agreement is less about obligations that carry on after a king is overthrown than it is about the benefit to the king of being restored.

In paragraph 26, section 2, there is one little point.

Reader: "The most certain implication is if the literal meaning would in any case involve something unlawful, that is, at variance with the precepts of the law of nature or of divine law."[xix]

LS: I will only note, whatever it may be worth, that he does not give an example of a promise conflicting with divine precepts, only with natural precepts, whatever that may mean. Let us come now to the beginning of today's assignment, chapter 17. We must first remind ourselves of the plan of the whole second book, and we will return for one moment to the beginning of Book 2, chapter 1, section 2.

Reader: "Authorities generally assign to wars three justifiable causes: defense, recovery of property, and punishment."[xx]

LS: Now hitherto we have discussed defense in the wider sense of the term with all its implications, and now he comes to reconsiderations of things, in chapter 20.[22] Let us look at the beginning of chapter 20.

Reader: "But when we began to speak of the reasons for which wars are undertaken, we said that acts must be considered in two categories, according as they can be repaired or punished."[xxi]

LS: Now this is already the subdivision, because what he does in the first part were not yet acts, but foreseen acts. This distinction was made somewhere.[xxii] Let us now read the beginning of chapter 17.

Reader: "We have said above that there are three sources of our legal claims, pact, wrong, and statute. Enough has been said about contracts. Let us come now to what is due by the law of nature in consequence of a wrong."[xxiii]

LS: Again, literally translated, "naturally," what is due naturally. But it is important that he does not use the phrase "natural law" all the time. He uses a more simple adverb. Therefore, the[23] [new subject] is reparations—no, I'm sorry, reparations begin in chapter 11 and first, when the claim to reparations is based on pact, in chapter 16, on damage, chapter 17, and on the basis of law, chapters 18 and 19. Punishment is then discussed in chapters 20 and 21. Now let us begin with paragraph two.

Reader: "Damage, the Latin word for which, *domino*,[xxiv] was perhaps derived from the meaning to take away, *demere*,[xxv] in Greek is "the being less"; that is, when anyone has

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[xix] *JBP*, 2.16.26.2.
[xx] *JBP*, 2.1.2.2.
[xxi] "Above," not "but," is the first word of the passage in the translation. *JBP*, 2.20.1.1.
[xxii] Grotius made this point at 2.1.16.
[xxiii] *JBP*, 2.17.1.

less than belongs to him, whether by a right that accrues to him from the law of nature alone—"

LS: From mere nature.

Reader: "From mere nature alone, or is reinforced by the addition of a human act—"

LS: Reinforced, or with the coming in addition to it, meaning accidental[24] [or conventional], and I think the key point is that it is not based on pure natural right.

Reader: "Or in addition[xxvi] a human act, as by ownership, contract, or—"

LS: Because, as we know, there is no natural property. Property is acquired by human act.

Reader:

> ownership, contract, or legal enactment.
>
> By nature a man's life is his own, not indeed to destroy, but to safeguard; also his own are his body, limbs, reputation, honor, and the acts of his will. The previous part of our treatise has shown how each man by property right and by agreements possesses his own not only with respect to property but also with respect to the acts of others. In a similar manner, everyone acquires his particular rights from the law, because the law has the same power, or greater power than individuals have over themselves or their property. Thus a war is the right[xxvii] to demand a certain diligence and care from his guardian,[xxviii] and likewise a state from an official;[xxix] and not of the state only, but also individual citizens, as often as the law indicates such a requirement explicitly, or by a sufficiently clear implication.[xxx]

LS: Now what belongs to a man from the side of nature alone, *i.e.*, without the[25] intervention of any human act? These things he mentions here. The body naturally is not due to an act of our own. We have a body and eyes and ears, etc. This is the famous basis of Hobbes and the whole following school. Grotius takes the broader view. Fame and reputation and honor and one's own actions—they also belong to it. But surely fame and honor are not the basis of an act of nature in Hobbes. This is one point. Property does not belong to what belongs to man from the side of nature alone and Grotius also points out,

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[xxiv] In original, not "*domino*"; "*damnum*."
[xxv] In original, not "the meaning"; "the word meaning." The Greek word "*demere*" is marked inaudible in the original transcript.
[xxvi] In original, not "Or in addition"; "or is reinforced by the addition of."
[xxvii] In original, not "war is the right"; "ward has the right."
[xxviii] In original, not "certain diligence"; "certain degree of diligence."
[xxix] In original, not "a state"; "the state."
[xxx] In original, not "and not of the state only"; "and not the state only." *JBP*, 2.17.2.1.

what Hobbes never points out, that man's right to his life does not include the right to destroy it or, as some people say: It is my body, I can do with it what I like. This may be defended on Hobbes's basis, but not on[26] [Grotius']. You have it to guard it and to cultivate it, to use a biblical phrase, not to destroy it.

This is clear. But what belongs to a man according to right strictly understood? That he will make clear in the next section.

Reader:

> But true ownership and the consequent necessity for restitution do not arise from aptitude alone, which is not properly called a right and which belongs to distributive justice; for one does not have ownership to that for which one has merely a moral claim.[xxxi] "The man who out of stinginess does not assist another with his money commits no crime against justice properly speaking," says Aristotle. Cicero, in the oration *For Ganeus Plancius* says: "This is the condition of a free people that, in the case of every person, it is able by means of votes either to give or to take away what it wishes." Yet presently he adds that it happens that a people may do what it wishes to do, and not what it ought to do, using the word "ought" in its broader sense.[xxxii]

LS: In other words, if they vote a man a dogcatcher who is wholly unfit for being a dogcatcher, it's their right; they may do it, but it is not what they should do. We know this distinction by now. What you may do, say, with your property, all kinds of things which you should not do, but still this may be not irrelevant, because that is the sphere of suing [and the just] claims of others. It is decisive. The most beautiful example of this distinction which I know occurs in Kant. Kant is concerned with the question of lying. Kant is a very strict moralist: lying is immoral under all conditions, so that [if] a potential murderer, a would-be murderer, who asks you about the whereabouts of his victim, you can't lie to him. You can refuse to answer his question, but you can't lie to him. That goes much beyond the Christian tradition, which is very strict. On the other hand, the right of man, the natural right of man as I understand it, includes the right to lie. Now this is no contradiction; it is practically the same thing. Morally, lying is simply bad, but [strict] right is much laxer than morality. You have a natural right to lie; in other words, no other man can demand that you tell him the truth. The political implications are of course immense. If morality becomes the basis of political society, then you have severe censorships of all kinds to prevent lying, and if, on the other hand, right becomes the basis, then you have practically perfect freedom of lying except in exchange or in some very limited cases.

So the philosophers state the issues with which we are all very familiar from everyday life, only in the neatest and clearest forms. Here we have an example of this. Of course,

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[xxxi] In original, not "does not have ownership to that for which"; "does not have ownership of that to which."

[xxxii] The words "oration *For Ganeus Plancius*" are marked inaudible in the original transcript. *JBP*, 2.17.2.2.

he quotes here a passage from the Fifth Book of the *Ethics*. Aristotle is naturally not concerned with distinguishing right strictly understood in Grotius' sense from morality. Aristotle is concerned in making a distinction between justice as the social virtue and the other virtues. Now what is his example? A stingy man does not as such violate other men's rights—I mean, accidentally he might; but he is only stingy and only a mean fellow, but this can go together with the fact that he always fulfills his [strict] duties.[xxxiii]

To repeat this point which I made on an earlier occasion: for Aristotle, justice in the narrower sense, in the strict sense, includes distributive justice, whereas right strictly understood according to Grotius excludes distributive justice. But this is of course not so simple as we see from the next paragraph.

Reader:

> At this point care must be taken not to confuse things which are of different kinds. For one who has been entrusted with the duty of appointing magistrates is under obligation to the state to choose a man who is worthy, and the state has a special right to demand this. If, therefore, the state has suffered damage to the choice of an unworthy person,[xxxiv] the man having the responsibility of choice will be bound to make the law good.[xxxv]

LS: We see here the case of Mr. Isaacs and Governor Kerner and the legal responsibility.[xxxvi] I do not wish to prejudge a case . . . .

Reader: "So also any citizen who is not unworthy, although he has no special right to any office, nevertheless has a true right to be a candidate for an office along with others—"

LS: Is this not clear? In other words,[27] [a candidate] cannot sue I-don't-know-whom for not having been made alderman, but he has the right to be a candidate.

Reader:

> and if he is hindered in the exercise of this right by force or fraud he will be able to collect the estimated value, not of the entire thing sought, but of that uncertain damage. The case will be similar if a testator has been hindered by force or fraud for willing anything to a man.[xxxvii] For the capacity to receive a legacy is a kind of right, and consequently it is an injury to interfere with the liberty of a testator in such a matter.[xxxviii]

[xxxiii] Grotius cites here *Nicomachean Ethics* 5.4; see also 4.1.
[xxxiv] In original, not "damage to the choice"; "damage from the choice."
[xxxv] In original, not "to the make the law good"; "to make the loss good."
[xxxvi] Theodore Isaacs was campaign manager for Otto Kerner in his successful bid for Illinois governor in 1960. Both were subsequently indicted (and ultimately convicted) of bribery, conspiracy and tax-dodging.
[xxxvii] In original, not "for willing anything"; "from willing anything."
[xxxviii] In original, not "a testator"; "the testator." *JBP*, 2.17.3.

LS: What he is driving at, at least in the first part of the argument, is this: some elements of distributive justice are, as it were, reflected on the level of commutative justice. To that extent they belong to commutative justice. It is only a subtlety, not irrelevant of course, but it does not affect the fundamental point. Let us turn to paragraph 19 in the same chapter.

Student: [Inaudible question]

LS: That is not so; one can say that commutative justice is to that extent on a lower level because it doesn't deal with the grandest things. It deals maybe with millions and billions, but not the really highest goods. But distributive justice is a different story, especially the distributive justice which distributes offices. But Aristotle is here not concerned with any possible legal machinery—how you can guarantee, for example, that a man who has played such a great role in winning the Second World War, like Churchill, must stay in office at least until the thing is settled in Europe? Aristotle would say, given this regime, that it depends on the good sense of the British electorate, and then the electorate would be punished for it in the way peoples are punished: not by law courts but by later events, as we had occasion to observe.

But this justice is of a very high order, and it is practically impossible to find a simple legal expression unless you might say that only those people must have the vote or must have a part in government who are men of unusual intelligence and unusual virtue. This is what is understood by aristocracy, and this is in theory the best answer which can be given. It is not so simple in practice, because when these[28] [rights] are available only to men of virtue, then the men who are not so virtuous will pretend to be virtuous. And then it is very hard to find out in all cases, and therefore people use ordinarily cruder yardsticks and say: [We will identify] people who can be *presumed* to be virtuous. And[29] that is of course aristocracy in the vulgar sense of the word: people who come from good families and have good breeding should rule. There is something to that, but we know also that this is no protection against black sheep. Nature, as Aristotle in his wisdom says, wishes it that good parents should have good children. We can't do it in all cases, as we know. In the oldest families of the world there are black sheep. We all observe this every day, and so there is nothing which can be done about that, and therefore in practice the question is—that is the difference between us and Aristotle. Aristotle says even this very imperfect reflection or image—image is of course not the right[30] [word], contrary to a certain present-day jargon according to which the most important thing is the image, the image is of course only a reflection in the mirror. But to come back to the point, Aristotle, like Cicero and Plato, says that even this image of the true aristocracy, what we might call the empirical aristocracy, is better than the alternative. Looking back at the crimes and[31] [evils] committed by these aristocracies, modern man has turned it around. We tried to give the natural aristocracy of which Jefferson spoke a chance in a democracy, and in theory, of course, this solution is as sound as the Aristotelian solution. It has also of course[32] [implemented] the constitutional dependence of the best men of the democracy on the mass of the people, and therefore everything depends on the quality of the mass of the people. If they are very depraved, then the defenders of these virtuous men cannot

but[33] concede that[34] [the virtuous have no] effect on them; but if it is a populace of a high caliber, accustomed not only to pay lip service to severe morality but living up to it, the[35] [case] would be different. We will not find in any book a solution which is fit for immediate use: what we can learn from the great books is to articulate fundamental problems so that we can make our own decisions with somewhat greater clarity than we otherwise would.

Student: [Inaudible question]

LS: This would need some[36] [clarification], to what extent this was not a concession to the situation in his age. After all, he came from a republic, as you know. The people who drove him out were, so to speak, the monarchical party.[37] [It was Prince Maurice of Nassau and the orthodox Calvinists] versus the urban patricians, which were as patricians of course republican and "aristocratic."[xxxix]

Student: [Inaudible question]

LS: But I believe that would not be for him a question of natural right, [whether a state was] a monarchy or a republic, and he would simply say what *kind* of monarchy. That depends on the arrangement there, not on the will of the people there, because the regime might have been established by war. Say, the[38] [Portuguese] in Angola are perfectly right, from Grotius' point of view, and there is no question [of a right of rebellion].[xl] Natural right as he understands it does not decide the question of regime, except that it excludes tyranny.

Student: But that would be a substantiation [inaudible].

LS: But then he would say that this is a question belonging to politics and not to law, to jurisprudence, and he would say that jurisprudence can only define what other duties or rights citizens [have] in any regime. This alone could belong to natural right, and anything else would of course presuppose the different premises of this or that regime, [jurisprudence] not[39] relying on specific premises, but premises supplied by natural right. I believe in this respect he wouldn't differ from Thomas Aquinas. Thomas offered a certain preference for monarchy, but he didn't mean of course that democracy is against[40] [natural] right. In this respect he is very neutral. The doctrines which asserted that this and only this kind of regime is in accordance with natural right are the exceptions. They are only much better known popularly, say, Tom Paine and similar famous and very effective writers said the only regime according to nature is democracy, and democracy was victorious. From the traditional point of view natural right was neutral. This one must never forget. Even Hobbes says that monarchy is the best, but this is a mere probable judgment and does not have the certainty of his teaching proper.

[xxxix] The question seems to be about Grotius' involvement in the Dutch politics of his day. Grotius was imprisoned by Maurice after that prince carried out a coup overthrowing the Dutch States General, of which Grotius was a member.

[xl] The Portuguese ruled Angola as a colony for centuries, but a liberationist movement took up arms in 1961.

Paragraph 19.

Reader:

> But by the consent of nations the rule has been introduced that all wars declared and waged by the authority of the sovereigns on both sides should be considered lawful as regards their external effects, of which we shall speak below; and so also it follows that the fear of such a war is considered as just up to the point that what has been obtained by it cannot be demanded back. In this sense the distinction of Cicero can be admitted, between public enemies, on the one side, with whom by the agreement of nations we have, as he says, many rights in common, and at the other side pirates and robbers.[xli] So if pirates and robbers have extorted anything by fear its return can be demanded, unless an oath prevents[xlii]—

LS: Even in that case you are obliged to leave it to them, to these crooks. But if it was only a promise, that's different.

Reader:

> but such a demand cannot be made of public enemies.
>
> The opinion of Polybius, therefore, that the Carthaginians had a just cause in the Second Punic War, because the Romans by threatening war had forced from them the island of Sardinia, and also money, when they were occupied for the revolt of their mercenaries, has a certain appearance of natural justice; it is, however, at variance with the law of nations, as will be explained elsewhere.[xliii]

LS: The law of nations, *ius gentium*—we have discussed the ambiguity of the term. *Ius gentium* is not only the law of nations, but as you know it is also not natural, originating in human consent, but of a broad validity, *i.e*., accepted by many nations [though] not necessarily by agreement between these nations. It could have grown up in each of them independently. Now the key point: the *ius gentium*, in contradistinction to natural right, regards all formally correct wars as just wars, *i.e*., if this is a government *de facto*, war is[41] a right and then the war is just. The unjust wars are only made by people who are not governments *de facto*, *i.e.,* a robber baron or pirates. This is absolutely crucial, because it means in effect that we have to treat all wars as just. There are cases where an impartial observer says: This [war] is clearly without any provocation, but merely for frivolous reasons [it] brought this misery. This distinction, Grotius would say, is important and I think quite rightly, but he would say [that] as far as the actual life between the nations is concerned we must disregard it. In other words, to take an example not from Grotius: to begin a war without declaration of war, to shoot prisoners of war—this is forbidden. I speak of the later development of international law. So there are unjust acts possible. But

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[xli] In original, not "at the other side"; "on the other side."

[xlii] "For if pirates and robbers" is the wording of the start of this sentence in the translation.

[xliii] In original, not "occupied for the revolt of their mercenaries"; "occupied with the revolt of their mercenaries." *JBP*, 2.17.19.

the question of the causes of the war, the origins of the war, is no longer a question[42] of right or wrong.[43] [It is] no longer justiciable, if that is the proper word, and questions which are not justiciable are not subject [to] justice or injustice. This is of course not true. If a power is much too great to be subjected to any earthly tribunal, then a reasonable man who watches this power can very well arrive at a sound judgment. It is what the good historians do for us. They are the tribunal in a sense, the only earthly tribunal possible.

Student: Is he saying here that any *de facto* government is just? Is he saying here that any war waged by a *de facto* government is just?

LS: Is to be regarded as just. This is [a] legal fiction. But to the extent that we have to act and decide on the basis of legal fiction . . . .

Student: Supposing a war were waged as what we call a guerilla war but in the name of putting back on the throne a deposed monarch, would that be a just war?

LS: I suppose. Grotius would be on our side today. We also can argue independently of Grotius—what is good for the goose is good for the gander.[xliv]

Student: But a war waged not in the name of putting back on the throne a deposed monarch is not just. Say a standard guerrilla war.

LS: Let me put it this way. To restore a deposed monarch and[44] [overthrow usurpers] and this kind of thing is all right, but to throw out a[45] [reigning monarch] is wrong. But you must not forget that the reason for this kind of law is this: Why is this legal fiction made—that all formally correct wars in the sense defined, *i.e*., all wars started by a[46] *de facto* [government] are just. In order not to open up infinite recriminations—no settlement is possible when there is no possibility [of ending the claims and counterclaims]—there is[47] a kind of statute of limitations or a prescription. In other words, a concern with stability. But these people of whom you are speaking are concerned with instability and, generally speaking, one must say that the concern with stability comes first,[48] [although] there might be very great causes which might make a reasonable man prefer instability to stability.

[change of tape]

LS: In other words, the majority of men except in extreme situations want to have law and order first, and I think that is also true of the traditional thinkers. This has great implications. In other words, the case is in favor of those in possession, and you can rightly say, as[49] [many] men have said, that possession may rest on terrible usurpations.

[xliv] The point seems to be that guerillas who have deposed a monarch can't complain if they face a pro-monarchist guerilla campaign in return. "Our side" would then refer to what we might call "legitimists," or, in the context of the Cold War, defenders of the status quo (or the status quo ante) in the face of communist insurgencies and governments that have been established by such insurgencies.

As Hobbes put it, there is no government in the world whose beginning can be justified in conscience. Was the case for William the Conqueror really a hundred percent clear, and some other cases of this kind? In matters[50] [of legitimacy], Elizabeth would lose her throne because someone found a defect in the title of[51] [William the Conqueror]. Fortunately, it is an unrealistic example.

Student: [Inaudible question]

LS: But that was a revolutionary, and Grotius is the opposite of a revolutionary. This was only a small part, and there were other reasons why people opposed the Stuarts, and if you limit yourself to the key point, to the actions of Charles I which led to the[52] [English Civil War]—that was a much stronger claim—you know that they couldn't trust him, that they could not trust him that he would act within the traditional limitations of the sovereignty of the British king.

Student: But there is a paradox about this though, because he is denying the case of the Carthaginians on the basis that wars do not have to be just anyway. He says the Carthaginians don't have a just cause for war, because wars are more or less just anyway.[xlv]

LS: That's not right: he says they have a certain appearance of natural equity, *i.e.*, he doesn't want to go into it and therefore he does not show why it is only the appearance. But he says that [it] looks as though the case were good but[53] [Polybius][xlvi] deviates from the law of nations, because the law of nations in its wisdom, taking into consideration not only this case but generally speaking cases of that kind, decides that you get into infinite confusion if you do not treat[54] the wars waged by *de facto* governments as just.

Student: But at the same time, all you can say is that the Carthaginians don't have a just cause for war, but if they go to war anyway . . . .

LS: No, but the difference remains. Perhaps this is not the best example and Grotius is right that it has only an appearance of equity, but there is no doubt that an impartial man can reach a conclusion[55] [regarding the] justice of [a] war, even of his own country. I have seen American fighters . . . you know you find these people who invariably find fault with their own country, but other people who had all kinds of qualms regarding the Mexican war.[xlvii] It's possible. But the question is: Can this be made pertinent at the time on the political plane? That is the question.

The difference between a just war and an unjust war is not rejected by Grotius, but the legal basis on which international law operates is that all formally correct wars are

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[xlv] We are now discussing 2.17.19.

[xlvi] Polybius is the author who, Grotius reports, advances this opinion about the Carthaginians' legitimate cause of war.

[xlvii] Presumably the Mexican-American War of 1846. Many Americans, most notably Henry David Thoreau, vehemently opposed this war.

justified. You know what I mean by formally correct wars: a government *de facto*, declaration of war . . . .

Student: In other words, whether they are lawful or just wars in regard as to what the rights are . . . .

LS: But that's the key point, namely, if they conquer the province in an unjust war, that is as good as if they conquered it in a just war.

Student: But you would still talk about whether there were just or unjust causes for the war—the property . . . .

LS: Sure. For example, if Frederick the Great took away Silesia from the Empress Maria, we may reach the conclusion that it was an unjust war, [but] this does not give Maria Theresa the right to reconquer it. I mean she may do it, but the war is then judicially neutral, *i.e*., as [neutral as] Frederick's first aggression.[xlviii]

Student: But supposing all the other nations not involved immediately in the war are free; that is, the rulers make a judgment on who was right and who was wrong. Supposing according to this law of nations, they have a responsibility to come in on the side . . . .

LS: But this responsibility is wholly unenforceable, because they didn't consult their own interests. It's good that Austria[56] [maintains itself], and it's good that[57] [Prussia maintains itself], these are the reasons of states and kingdoms, and they would not worry so much about the legal questions since they are complicated and they have very well-paid lawyers in each camp who can draw up a beautiful declaration. But to come back to the main point: Grotius, in contradistinction to the later development of modern international law, maintains the distinction between just and unjust war. But the question is of[58] [practicality, and here just and unjust cannot effectively be decided], as we have seen from this very paragraph.

Let us read the end of paragraph 20, section 1. This is in a similar context.

Reader: "I said that in truth it could not have been foreseen, whether the men were going to be wicked men; and that in truth we could not avoid utilizing the services of wicked men, but otherwise an army cannot be collected."[xlix]

LS: In other words, that is a deeper reason for all these adaptations, these concessions, to Machiavelli. War is waged by armies. Armies never consist entirely of saints. This is one of the hard facts which no one can deny, and therefore we must face it. He uses very strong words, but I thought that was a remarkable statement. This explains the reason.

[xlviii] Frederick the Great invaded Silesia, which was part of Austria, upon Maria Theresa's accession to the Austrian throne in 1740. She attempted to dislodge him by force, but was unsuccessful.

[xlix] In original, not "but otherwise"; "that otherwise." *JBP*, 2.17.20.1.

Let us turn to chapter 18. The right of legation is based on *ius gentium, i.e.*, not on natural right. That in itself is very strange. According to Hobbes, the safety for mediators of peace—and how can you have peace without sending[59] [mediators]—belongs to natural right because peace is the end which natural right serves, and therefore the essentially necessary conditions of peace, which are legations, belong to natural right.[l] This is very remarkable. At the end of paragraph 6 in this chapter there is something about this matter.

Reader: "Such expressions of opinion are justified; for not only do very many matters come up in war which cannot be handled except through ambassadors, but [also] peace itself is hardly to be made by any other means."[li]

LS: This is an argument for Hobbes, to say that the right of legations in principle belongs to natural right. It is really a question: Why does Grotius decide that the law of legation does not belong to natural right? He explains in the sequel that legations are sometimes necessary even in civil war.

At the end of paragraph 3, one point: that the *ius gentium* which favors legation does not legitimate permanent embassies which we take for granted as an institution of international law. The right not to violate ambassadors belongs to the *ius gentium*, not to natural right. Let us perhaps turn to paragraph 4, section 3, the end, and there is a quotation from[60] [Sallust].

Reader:

> Equity and justice, that is, the pure law of nature, allow that punishment shall be inflicted on he who has committed wrong is found.[lii] But the law of nations makes an exception of ambassadors and those who, like them, come under a pledge of public faith. Wherefore, it is contrary to the law of nations that ambassadors should be brought to trial; and on that account many things, which the law of nature permits, are commonly forbidden.[liii]

LS: Do we get a glimpse of the reason why these legations do not have this clear status under natural right, as we would assume?

Student: Under some other aspect, the ambassador may be someone you've got every right to throttle.

LS: Sure, and spies and everything. But let us take the clearest case. We are engaged in a just war, and then the ambassadors come. They partake of the injustices of the cause. Why should they have a claim as being treated as innocent people? Is this not a point to which he alludes here? But I think we must consider the connection with the thought precisely if he takes the old view seriously, that it is possible and necessary to distinguish

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[l] Hobbes, *Leviathan*, chap. 15 (fifteenth law of nature).
[li] *JBP*, 2.8.16.
[lii] In original, not "on he who has committed wrong"; "when he who has committed wrong."
[liii] *JBP*, 2.18.4.3.

between—well, let us take a case within our own recollection. The Nazis:there was some degree of unanimity in that case. Should they be permitted to send ambassadors? Was not a Nazi ambassador simply considered as a Nazi, and therefore the ignominy attaching to the Nazis attached also the ambassadors? Something of this kind, I believe, is implied here, but let us perhaps go on. Paragraph 5, the first section.

Reader:

> Now the law which I have mentioned concerning the inviolability of ambassadors is to be understood as binding on the one to whom the embassy was sent, and especially in case he has received it, just as if from that moment, in fact, a tacit agreement had been entered into. But warning can be given, and in such cases it commonly is given,[liv] that ambassadors should not be sent; and that, if they are sent, they will be treated as enemies. Thus warning was given to the Aetolians by the Romans.[lv] Previously, the Romans had given warning to the ambassadors of Veii, that if they did not leave the city,[lvi] the Romans would do as Lars Tolumnius had done;[lvii] and the Romans were warned by the Samnites that they would not go away unharmed if they visited any assembly in Samnium.[lviii]
>
> This law, then, does not apply to those whose territories ambassadors pass without receiving a safeguard.[lix] For, if they are going to, or coming from, the enemies of this people, or are planning any hostile measure, they can even be killed; such was the fate allotted by the Athenians to the ambassadors between Persia and Sparta, and by the Illyrians to the ambassadors between the Issii and the Romans.[lx] And much the more can they be thrown into chains;[lxi] such was the decision of Xenophon against certain ambassadors; of Alexander against those sent from Thebes and Lacedaemon to Darius;[lxii] of the Romans against the ambassadors of Philip the Hannibal,[lxiii] and of the Latins against the ambassadors of the Volsci.[lxiv]

LS: Do you see this a bit more clearly? Obviously, here is a lot of classical precedence for his position. How can you know whether these ambassadors have not come to spy on you? Why should you let men who can be presumed to be spies into your city? That, I think, is the reason. There is no natural right obligation, but perhaps a convenience. The

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[liv] In original, not "it commonly is given"; "commonly is given."
[lv] "Aetolians" is marked inaudible in the original transcript.
[lvi] At the place where the translation has "Veii, that" the original transcript has "[inaudible] and."
[lvii] "Lars Tolumnius" is marked inaudible in the original transcript.
[lviii] "Samnites" and "Samnium" are marked inaudible in the original transcript.
[lix] In original, not "those whose territories"; "those through whose territories."
[lx] The names "Illyrians" and "Issii" are marked inaudible in the original transcript.
[lxi] The translation has "in chains"; the original transcript has "into [inaudible]."
[lxii] The words "and Lacedaemon to Darius" are marked inaudible in the original transcript.
[lxiii] In original, not "Philip the Hannibal"; "Philip to Hannibal."
[lxiv] The names "Latins" and "Volsci" are marked inaudible in the original transcript. *JBP*, 2.18.5.1.

point is this: If you permit them to send ambassadors, then you must[61] [treat them as inviolable], but it is your business whether you want to receive them or not.

Student: This came up just recently, where there were two Americans and an Englishman, I think, ambassadors in Russia, and they broke into . . . .

LS: They were not ambassadors, but they belonged to the embassy. All right.

Student: The question is: Did they have a right to do what they did?

LS: We are living in our age, and this makes it so difficult to live in, but the interesting thing is that all these types [of conventions] have broken down, and then we understand again the free international situation, no holds barred.

Student: Is that the situation today, too?

LS: We are approaching it, is this not correct? Among the Western nations, who in addition are allies,[62] [it] goes without saying [that these conventions will be honored], but beyond that, if you take into consideration the curtains,[63] these are the most difficult problems, as we understand, and of course practical necessity has an effect, as we have seen.[lxv] There are ambassadors on both sides, but the question is still (it is I believe no longer practical, but it is raised from time to time): Should America send ambassadors to Russia? That has been a question from time to time. I don't believe it's of any practical importance, but the question itself is interesting. There is no possibility of a dialogue, but still even for these certainly very minimum things, it is necessary.

Read the beginning of paragraph 10.

Reader:

> There is no reason for fearing that, as some think, no one can be found who would be willing to make contracts with an ambassador, if such is the ambassadorial right. For kings, who are not subject to compulsion, do not fail to have creditors; and Nicholas of Damascus informs us that among some nations it was the custom that action at law should not be granted in relation to contracts based in credit, any more than against ungrateful persons, with the result that men were compelled to carry out their contracts at the same time, or to be contented with a bare promise of the debtor.
>
> This is the state of affairs that Seneca desires: "Would that we could persuade men to give credit only to men who wish to pay, would that no contract bound the buyer to the seller, and that compacts and agreements were not guarded by the attachment of seals; would that they

[lxv] Presumably the "iron curtain" between the West and the Soviet Union and its satellites, and the "bamboo curtain" between the West and communist China.

> might not be kept rather by good faith in the mind that cherishes the sense of fairness!"[lxvi]

LS: I am induced by this remark to wonder whether this does not refer to right strictly understood, and that therefore right strictly understood is not identical with right which can be enforced. That's what you mean? But I believe this distinction which Kant later on made, if I understood it very well, is this. It is not important whether it is actually enforced or not, but by its nature it could be enforced.[lxvii] Perhaps this is also what Grotius meant.

Now let us turn to chapter 19. The beginning makes clear to some extent the connection between legation and[64] burial of the dead.

Reader:

> The burial of the dead also is an obligation which had its origin in the law of nations; and this, in turn has its origin in the will.
>
> Among usages or "customs" which Dio Chrysostom contrasts with "the written laws,"[lxviii] after the rights of ambassadors, he declares that the "burial of the dead can't be prevented."[lxix]

LS: In other words, he has an authority, and the authority is as mere authority not[65] [revered]. What is the thought connecting burial and legation? Do you remember the famous cases in *Antigone*—well, *Antigone* is not correct, but[66] [*The Phoenician Women*] of Euripides and some other ones, when you read Thucydides on every page, what happens after[67] [battles]? One side wins and the other loses. The winner is in possession of the battlefield. The loser's[68] [dead] are in the hands of the victorious ones, and what do the losers do in order to fulfill their duty to bury them?

Student: They send heralds.

LS: Legations. So in other words, it is possible that this is a simple connection between these two subjects. You see here also, the Hebrews[69] [Philo and Josephus] call it [a] right of nature, and he gives some other examples of this kind. This right is called [a] most natural and divine right in classical and Jewish literature, but in fact, according to Grotius, it is neither divine nor natural right, but *ius gentium*.

[lxvi] Kelsey has "'by good faith and a mind that cherishes a sense of fairness!'"

[lxvii] Perhaps a reference to the Categorical Imperative, which is binding whether or not it is enforced by human authority, or to Kant's definition of "justice" as that set of moral obligations that are *capable* of being embodied in law. For the former, see *Groundwork of the Metaphysic of Morals*, trans. H. J. Patton (New York: Harper & Row, 1964), 68-69; for the latter, see *The Metaphysical Elements of Justice*, trans. John Ladd (New York: Bobbs-Merrill, 1965), 35-9.

[lxviii] "Dio Chrysostom" is marked inaudible in the original transcript.

[lxix] In original, not "can't be prevented"; "should not be prevented." *JBP*, 2.19.1.1.

In paragraph 1, he makes clear further on that these two rights are rights which belong to the civilized nations and are common to them, and both these rights, in order to give them greater sanctity, have been ascribed to the gods. The beginning of paragraph 2.

Reader:

> All do not seek to hold the same opinion regarding the cause of the introduction of the custom that bodies should be covered with earth,[lxx] whether first embalmed, as among the Egyptians or cremated, as among most of the Greeks, or buried as they are now—

LS: Now what is that? This is a custom. Custom means of course something different from natural right, something which is based on human[70] [practice] fundamentally. In this paragraph, section 4, he raises the question: What is the reason for this custom?[71] [Human worth.] This reason is not mentioned here among the reasons which Grotius rejects. Now what does he regard as the basis of [the duty of burial in] section 4?

Reader:

> A simpler explanation is that, since man surpasses the other animate beings, it is seemed an unworthy fate that other animals should feed on his body;[lxxi] wherefore, that this might be as far as possible avoided, burial was invented.[lxxii] Quintilian said that because of the compassion of men, dead bodies were guarded against the attack of birds and beasts. Cicero says in his first book *On Invention*: "torn by wild beasts in death he lacked the common honor of burial." Also in Virgil we read:
>
> No loving mother shall bury thee in earth,
> Nor lay thy weight the ancestral tomb.[lxxiii]
> A prey to ruthless birds shalt thou be left.
>
> In the prophets God threatens the kings that are hated by Him, that they shall have the burial of an ass, that dogs will lick their blood. Like Lactantius has no other thought in mind regarding burial when he says:[lxxiv] "For we shall not suffer the form and image of God to be left prey the beasts and birds."[lxxv] So also Ambrose, whose words are: "there is no nobler duty than this, to confer a favor on one who can no longer requite it; to deliver from birds, to deliver from beasts, one who shares your nature."[lxxvi]

LS: This is a passage preferred by Grotius; you can say the dignity of man[72] demands that he be buried. In the following section there is something more.

[lxx] In original, not "seek to hold"; "seem to hold."
[lxxi] In original, not "it is seemed"; "it has seemed."
[lxxii] In original, not "as far as possible"; "so far as possible."
[lxxiii] In original, not "the ancestral tomb"; "in the ancestral tomb."
[lxxiv] "Like" is not in the translation. "Lactantius" is marked inaudible in the original transcript.
[lxxv] The end of the citation from Lactantius reads "to be left a prey to beasts and birds."
[lxxvi] *JBP*, 2.19.2.4.

Reader: "Even the dead should not be exposed to such injuries, nevertheless, with good reason it seems foreign to the dignity of man's nature—"

LS: Here the word ["nature"] occurs.

Reader:

> that a human body should be trodden under foot and torn to pieces. Not inconsistent with this point of view is the statement of the[lxxvii] *Controversies* of Sopater:[lxxviii]
>
> > *It is a noble act to bury the dead; and by nature herself this boon was granted as it were, to corpses that they might not be exposed to shame after death by rotting away in nakedness. Whether the gods or the demigods granted this honor to bodies that are done with life, such disposition of the dead is agreeable to all men. In fact, since it is at variance with reason that the secrets of human nature should be exposed to the view of all after death, we have accepted from antiquity the custom of burying human bodies in order that, concealed in a tomb, they might waste away in secrecy, far removed from sight.*[lxxix]

LS: In other words, there is a certain—[73] [and] this explains why it is *ius gentium* and not *ius naturae*—this consideration of decency. I mean decency in the external sense of the word, of sense of shame, of what the Greeks call[74] [*kalon*], the beautiful or noble, which has very much to do with the appearance, not only with the deeper sense. That is somehow covered up by our tradition, where[75] [*kalon*] is translated into Latin by *honestum*, and this is a strictly moral meaning which it does not have in Greek. In other words, a certain concern with propriety. Of course, the dignity of a man is not lost if he rots somewhere in a field, that's clear. The corpse is no longer the man, that is the fictitious element in it. But still we extend, in an unintelligible way, the respect we have for the human being to his corpse as his "remains." But there is some transition in that, which is not entirely rational, and therefore it does not belong to natural right, but to *ius gentium*.

Student: I was wondering what you would say about Aristotle here.

LS: Sure. I mean after all, Aristotle was a decent man, but the question is simply: What is the cognitive[76] [status] of[77] [this concern for corpses]? And we have an utterance not from Aristotle but from someone rather close to him or his best friends, namely Socrates.[78] In the *Phaedo*, when they ask him, what shall we do with your corpse? Socrates confesses it is utterly indifferent because it is no longer *I*. If it is decided by religious tradition in one way or another, say, against cremation or something, and decent men follow that, [this is *ius gentium*].[79] Similarly, if it is decided by divine law, that's a proof that it is not by natural right. Keep this in mind. That man is created in the image of

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[lxxvii] In original, not "of the"; "in."
[lxxviii] "Sopater" is marked inaudible in the original transcript.
[lxxix] *JBP*, 2.19.2.5.

God, to which he refers in paragraph four, is of course a reason belonging to the divine law, not natural law.

He gives then a biblical example in paragraph 4, section 3, between David and Goliath.

Reader: "And the act of David, in keeping the head of Goliath for show was done, in fact, against a foreigner who was a despiser of God, and under that law which limited the characterization of neighbor to the Jews alone."[lxxx]

LS: Does he not also mention here the example of Manlius and the giant Gaul?[lxxxi] This is a parallel in Livy, which Machiavelli[lxxxii] wickedly uses.[80] A Roman, Manlius, kills a giant and then does not do any violence to the corpse. Oh, he takes off a golden chain . . . and then the story of David who cut off the head, which seems to be much more savage. I mention this only in passing. Grotius tries to show why David's different[81] [conduct is justified by piety]—this he admits as a perfectly good justification. Through his eyes, [Goliath] must not be buried, for the very good reason that this is the only punishment for those who do not regard death [itself] as a punishment. Of course, this is complicated because do the[82] [dead] notice their not being buried? And is it not of the essence of punishment that[83] one feels the punishment? Yet, paragraph five, section four . . . .

Reader:

> Some of the Jews, however, make one exception to the law against killing oneself, considering it as a "commendable exit," as it were, if anyone should see that thereafter he would be living as a reproach of God Himself. For because they assign the right over our lives not to ourselves, but to God, as Josephus rightly teaches his countrymen, they think that the presumption of the will of God alone justifies the determination to hasten death.[lxxxiii]
>
> To this justification they refer the case of Samson, who saw that the true religion was an object of derision his own person;[lxxxiv] also, that of Saul, who fell on his sword that he might not be made sport of by the enemies of God and of himself. For they make out that Saul returned to his senses after the shade of Samuel had predicted his death; and after he knew that his death was at hand if he should fight, he did not decline battle for his native land and the law of God, thence meriting eternal glory, according to the witness of David; those who had buried Saul with honor received from David the acknowledgement of a deed rightfully done.[lxxxv]

[lxxx] The word "neighbor" is marked inaudible in the original transcript. *JBP*, 2.19.4.3.
[lxxxi] Grotius does not mention this case in the present chapter.
[lxxxii] See Strauss, *Thoughts on Machiavelli* (Chicago: University of Chicago Press, 1978), 162-3. The story is related by Machiavelli in *Discourses on Livy*, bk. 3, chap. 34.
[lxxxiii] "Josephus" is marked inaudible in the original transcript.
[lxxxiv] In original, not "his own person"; "in his own person."
[lxxxv] In original, not "rightfully"; "rightly."

> A third case is that of Rossi , a senator of Jerusalem, and the history of the Maccabees.[lxxxvi]
>
> Furthermore, in the history of Christianity we find similar examples of those who committed suicide in order that, when put to torture, they might not forswear the religion of Christ; also, of virgins who threw themselves into a river that they might not lose their chastity; the virgins the church enrolled in the list of martyrs. But nevertheless it is worthwhile to see what Augustine thinks of such cases.[lxxxvii]

LS: I would say it is a very powerful statement of Augustine, which is of course minimized by being relegated to a note,[lxxxviii] and I have the impression that Grotius has a certain sympathy for this other view, also shared by some Christians not as strict as Augustine, that there are cases in which suicide is not a dishonorable action.

We go now to this very important chapter on punishment, chapter 20. What is the situation here? What right is underlying the institution of punishment? Why may men punish men? Which right entitles him to do so? Natural right, divine right, *ius gentium*, or what?

Student: Natural right.

LS: Natural right, by all means. He quotes here in paragraph 1, section 2: "punishment is an act of charity" and punishment is not an act of malice.[lxxxix] In[84] paragraph 2 he raises the question: Does punishment belong to distributive or commutative justice?[xc] There is a certain confusion here regarding commutative justice, because the guilty man does not have a right to punishment. That is a misleading expression. Like a buyer has a right to the thing he bought. The guilty man did not directly wish to be punished or wish to deserve punishment, but he wished only to transgress and hence, by consequence, most unpleasing to him, he wished to deserve to be punished. Strictly speaking, he did not wish to do that.

Then the great question of the purpose of punishment arises. I think we can read in paragraph 3 about the question of the right of punishment.

Reader: "But the subject of this right, that is the agent to whom this right is given, has not been definitely fixed by nature itself."

[lxxxvi] "A third case is that of Razis, a senator of Jerusalem, in the history of the Maccabees" is Kelsey's text.

[lxxxvii] *JBP*, 2.19.5.4.

[lxxxviii] In the marginalia and notes, Grotius cites Augustine *City of God*, Bk. 1, chap. 16 (see also chap. 17); *To Dulcitius*; *Against Gaudentius*.

[lxxxix] The word "charity" is not used in any of the citations in 2.20.1.2, but the concept may be inferred.

[xc] *JBP*, 2.20.2. Strauss is using the Aristotelian terms for contractual or arithmetic justice (measure for equal measure) and justice based on merit or geometric proportion (*Nicomachean Ethics* V.3-4). The terms Grotius uses are "expletive" and "attributive" justice, respectively (see also *JBP* 1.1.8).

LS: This is a difference. Locke says it is fixed by nature. And here you have a clear difference. It is more complicated as we will see in the sequel.

Reader:

> For reason declares that the criminal may be punished. It does not, however, declare who ought to inflict the punishment, excepting so far as this, that nature makes it clear enough that it is most suitable that punishment be inflicted by one who is superior; yet not to the degree that this is shown to be altogether necessary, unless the word 'superior' is understood to imply that he who has done wrong by that very act may be considered to have made himself inferior to someone else and as it were to have demoted himself from the class of men into the class of beasts that are subject to man.
>
> This view has been advanced by certain theologians.[xci]

LS: Now where does he go on from here? I'm sorry I cannot find this remark which is so striking, but I will look it up.[xcii]

I would like to say only in preparation for discussion next time, the very interesting discussion of the purpose of punishment. This is of course an extremely topical subject, and the three ends of punishment which Grotius has: betterment, now called I believe rehabilitation; example, so that others are deterred; and what he discusses in the center, *timoria*. What is that? Well, if we say "revenge," that would be too harsh, but it surely has something to do with that, and the key point is this. There must be some compensation for the sufferer or for the family of the sufferer. They have suffered terrible pains, and there must be some pain inflicted as a type of comfort for them, apart from all concerns for betterment. Now this last point today is absolutely obnoxious. The utmost which is admitted is the deterrent or protection of society and improvement. *i.e.*, rehabilitation [and deterrence], and the key case is naturally capital punishment because a man can no longer be rehabilitated for society through capital punishment, for reasons clear to the meanest capacity.

Now I would like to read to you one passage from Leibniz, [*Theodicy*], paragraph 73, where we find a very clear statement of this older view.[xciii] Now Leibnitz[85] [maintains] of course a connection with original sin, eternal punishment and not simply human punishment.

[xci] *JBP*, 2.20.3.1.

[xcii] Is Strauss pursuing his previous thought about Locke? Locke makes some very striking remarks about the "bestial" character of criminals in the state of nature. See, *e.g.*, *Second Treatise* §§ 10, 16.

[xciii] G. W. Leibniz, "Essays on the Justice of God and the Freedom of Man in the Origin of Evil, in Three Parts," part 1, paragraph 73 in *Theodicy: Essays on the Goodness of God, the Freedom of the Mind, and the Origin of Evil*, trans. E. M. Huggard (La Salle, IL: Open Court, 1985), 161-62.

He speaks about Hobbes, Hobbes's discussion with Bishop Bramhall, which he has read in English and is unfortunately not yet available in Latin [laughter], in London in 1633. They are in English and have not been translated as far as I know, nor in connection with Hobbes's Latin writings. I believe when he says "not translated," he means into German.[xciv]

Hobbes of course was attacked very much because of his famous determinism. Let us say you kill a man, and let us take the clearest case, say, for murder, and you kill him, and he is innocent. He was compelled to murder. He couldn't help it.[xcv] You remember this argument from present-day discussions. He was compelled to murder and therefore is innocent. Well, Hobbes's answer is very simple: we are compelled to kill him. By our reflections, if we follow that compulsion, other people will be compelled by the gallows to abstain from murdering. Leibniz says that's perfectly all right as far as it goes. You can defend punishment, even capital punishment, on a deterministic basis. But then he goes on:[86]

> There is nevertheless a kind of justice and a certain form of rewards and punishments which does not seem to be so applicable to those who would act in absolute necessity, assuming that there is such an absolute necessity. There is that kind of justice which does not aim at improvement, nor at example, nor even at reparation of the evil committed by the evil doer. This justice is founded only in, convenance[xcvi] [**LS**: in convenience, but in the deeper sense, correspondence, one would say] which demands a certain satisfaction for the expiation of an evil action. The Thucynians,[xcvii] Hobbes, and some others, do not admit that this punitive justice,[xcviii] which is properly vindictive and which God has served for himself on many occasions,[xcix] but which he communicates to those who have the right to govern others and which he exercises through their means, provided they act rationally and compassionately.[c] The Thucynians[ci] [**LS**: what is now called Unitarians] believe this kind of justice to be without foundation, but it is always [**LS**: and now I come to the sentence which is so beautiful and, in a way, so unintelligible to most people today] but it is always founded on a relation of convenience instead of correspondence which satisfies not

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[xciv] Strauss seems here to be paraphrasing, in the first person, one of Leibniz's appendices: "Reflexions on the work that Mr. Hobbes Published in English on 'Freedom, Necessity and Chance,'" in ibid., 393-404.

[xcv] That is, according to Hobbes' determinism.

[xcvi] This word is marked inaudible in the original transcript.

[xcvii] In original, not "Thucynians"; "Socinians."

[xcviii] In original, not "do not admit that this punitive justice"; "do not admit this punitive justice."

[xcix] In original, not "has served"; "has reserved."

[c] In original, not "compassionately"; "passionately."

[ci] Leibniz has "provided they act rationally and passionately. The Socinians—." This selection continues in the main text.

> only the hurt man, but also the wise man who sees it, as a beautiful music or a fine architecture satisfies well-built minds.[cii]

You must know from English modern history that such distinguished men like [inaudible] and others describe public execution, and when I suppose every one of us would faint and they looked with perfect detachment: Did he lose his nerves? Did he make a fine speech? And which we don't have the nerves to do, but they had this position. He murdered, or he committed treason. Here an order disturbed is restored as a beautiful spectacle, in a way more beautiful than architecture or music. But surely that is a statement where you forget completely the[87] [gruesomeness] of punishment because of the sheer beauty of the spectacle.

Student: We have in our parlance a phrase for this that shows that it is of a higher dignity than architecture, because we call it poetic justice.

LS: But still, poetic justice is not an exercise in this manner. What are the names of these two men who were condemned for murder, which means they will be out in five years, assuming that they will not be out much sooner because they will surely appeal and the Supreme Court may have a different view than this Chicago judge? I do not believe that if they would really go to the electric chair that anyone would call this poetic justice. I mean whatever poetic justice may be, that is not poetic justice. Think of a drama in which two low-grade dope peddlers commit a murder and then are condemned to death—that's poetic justice.

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[1] Deleted "indeed."
[2] Deleted "It."
[3] Deleted "state."
[4] Deleted "self-."
[5] Deleted "But."
[6] Deleted "but also therefore."
[7] Deleted "he."
[8] Deleted "to."
[9] Deleted "[inaudible]."
[10] Deleted "[inaudible]."
[11] Deleted "to be."
[12] Deleted "But the fundamental reason is this."
[13] Deleted "don't they have."
[14] Deleted "things."
[15] Deleted "despise."
[16] Changed from "chances that a European state would be."
[17] Deleted "the."
[18] Deleted "burden."
[19] Deleted "post."
[20] Deleted "that [inaudible]."
[21] Deleted "that."
[22] Deleted "We could also."
[23] Deleted "[inaudible]."
[24] Deleted "[inaudible]."

[cii] In original, not "convenience instead of correspondence"; "convenance." The foregoing seems to be Strauss's own translation of the passage (with interpolations).

[25] Deleted “human.”
[26] Deleted “the others.”
[27] Deleted “[inaudible] claim he.”
[28] Deleted “high straits.”
[29] Deleted “therefore.”
[30] Deleted “thing.”
[31] Deleted “[inaudible].”
[32] Deleted “been implied.”
[33] Deleted “have.”
[34] Deleted “worthless.”
[35] Deleted “[inaudible].”
[36] Deleted “[inaudible].”
[37] Deleted “[inaudible].”
[38] Deleted “[inaudible].”
[39] Deleted “being.”
[40] Deleted “such.”
[41] Deleted “not.”
[42] Deleted “subject to a question.”
[43] Deleted “they are.”
[44] Deleted “[inaudible].”
[45] Deleted “[inaudible].”
[46] Moved “government.”
[47] Deleted “not.”
[48] Deleted “because.”
[49] Deleted “right.”
[50] Deleted “[inaudible].”
[51] Deleted “[inaudible].”
[52] Deleted “[inaudible].”
[53] Deleted “he.”
[54] Deleted “*de facto* governments,”
[55] Deleted “irregardless of.”
[56] Deleted “[inaudible].”
[57] Deleted “[inaudible].”
[58] Deleted “parctical importance.”
[59] Deleted “something [inaudible].”
[60] Deleted “[inaudible].”
[61] Deleted “[inaudible].”
[62] Deleted “that.”
[63] Deleted “and.”
[64] Deleted “[inaudible].”
[65] Deleted “revering.”
[66] Deleted “[inaudible].”
[67] Deleted “ambassadors.”
[68] Deleted “debts.”
[69] Deleted “[inaudible].”
[70] Deleted “worth.”
[71] Deleted “[inaudible].”
[72] Deleted “comes in.”
[73] Deleted “but.”
[74] Deleted “[inaudible].”
[75] Deleted “[inaudible].”
[76] Deleted “state.”
[77] Deleted “[inaudible].”
[78] Deleted “[inaudible]…”
[79] Deleted “but.”

[80] Deleted “There is a strictly parallel story in Livy, where.”
[81] Deleted “contact.”
[82] Deleted “death.”
[83] Deleted “punishment.”
[84] Deleted “Section.”
[85] Deleted “is.”
[86] Deleted “but.”
[87] Deleted “whole [inaudible].”

Session 9: November 3, 1964

Leo Strauss: [i]We began to study chapter 20 last time, and I remember that we spoke especially about this passage in paragraph 3 where Grotius compares the relation of the punisher to the punishee to the relation of a man to a brute, as Locke in the famous passages of *Civil Government*.[ii]

Now he turns then to the question of the purpose of punishment, *i.e.*, why is punishment not only permitted but may be obligatory? He gives then a discussion of[1] [the fact that] men are [sometimes] praised for not punishing, in paragraph 4, and surely punishment must be done with a view to the future as distinguished from the past, [according to the] statement made by [Plato in the] *Gorgias*.[iii]

Then the whole question of the New Testament comes up,[2] [and] the great exception for God. God may punish without a concern for any common future good because he is the Lord.[iv] He may do what he likes. This follows simply an ordinary theological view.

In paragraph 5, he speaks of the desire for revenge pure and simple and admits that it is natural, but it belongs to our nature only as animals in general, *i.e.*, not as rational and social animals. Look at a dog and look at some other creatures of this kind, and look at man. There is a certain similarity. You hurt the dog by stepping on his foot, you hurt a man by stepping on his foot, and the reaction is to some extent the same. It is perfectly natural, but indeed it is not since man has this higher story, so to speak, which the dog does not have, namely, reason; and[3] [a] difficulty arises. Hence revenge is not legitimated by law, by right of nature. But there are some complications here and we might read paragraph 5, section 1 of chapter 20.

Reader:

> As for the saying of comedy: "An enemy's pain soothes the injured one's woe"; and Cicero thinks that pain is assuaged by punishment, and Plutarch's quotation from Simonides:[v] "a sweet thing and far from grievous is it to apply as a remedy to a spirit distressed and enflamed the means of obtaining satisfaction,"[vi] these befit that natural instinct which man has in common with the animals.[vii] For anger in men as in animals is

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[i] The original transcriber notes that a student paper was discussed at the beginning of the session. The reading was not recorded, nor apparently was Strauss's response that followed.
[ii] Locke, *Second Treatise* §§ 10, 16.
[iii] See Plato *Gorgias* 472e-481b, where the implicit argument is that punishment is for the correction or betterment of the one punished.
[iv] *JBP*, 2.20.4.2.
[v] In original, not "Cicero thinks"; "Cicero's dictum." The name "Simonides" is marked inaudible in the original transcript.
[vi] The words "is it to" and "means of obtaining" are marked inaudible in the original transcript.
[vii] The words "befit that" are marked inaudible in the original transcript.

> "a warmth of the blood at the heart of the desire to avenge pain."[viii] But this mere desire is still lacking in reason and often acts against things that have done no injury, as the young and dangerous animal or against the inanimate object[ix]—

LS: A human being, too, might be angry at a table if he has hurt his shin; so that is the same thing.

Reader:

> But a desire of this sort, taken by itself, is incompatible with the faculty of reason, whose function is to govern the desires. It is, furthermore, incompatible with the law of nature, because that is the dictate of nature insofar as it is governed by reason and takes account of society—

LS: Because natural right is the dictate of the rational and social nature as such.

Reader:

> and reason forbids a man to do anything whereby another may be harmed unless this action has some good end in view. In the bare spectacle of the suffering, even of an enemy, there is always a false and imaginary good, as in superfluous riches and many other things of the same sort.[x]

LS: Read the first sentence of section 3.

Reader: "Therefore, it conflicts with nature for a man to act against another to be fated with the other's pain merely as pain."[xi]

LS: This is the key point. Man by nature has this desire to get comfort for the pain they have suffered by the pain of the man who inflicted them, and that appeases the pain—that empirical fact—and this is the great difficulty. Here Grotius simply says it has no standing whatever because it conflicts with the rational and social nature.

The true purpose of punishment, as he explains in the sequel, is improvement, example, and *timoria*. Let us say revenge, but see what revenge precisely means. What Latin term did you use?

Student: *Vindicatio*.

[viii] I original, not "'of the desire to avenge pain'"; "'from desire to avenge pain,' as Eustratius rightly defines it."

[ix] Here is Kelsey's wording: "But this mere desire is so lacking in reason that it often acts against things that have done no injury, as the young of a dangerous animal, or against inanimate objects, as the stone with which a dog is struck."

[x] In original, not "always"; "only." *JBP*, 2.20.5.1.

[xi] The translation: "Therefore, it conflicts with nature for a man who acts against another to be sated with the other's pain, merely as pain." *JBP*, 2.20.5.3.

LS: Yes, but *vindicatio* is general; *vindicatio* takes place in all cases.[xii] All right, then let us call, lest we got confused, [inaudible] reasonable, justifiable ground of punishment. Let us look at paragraph 6. The two aims put down by Plato, improvement and example, and[4] [Tuarus] added the third, *timoria*. How does he translate it?

Reader: "Vengeance."

LS: Go on . . . .

Reader:

> which Clement of Alexandria defines as "a retribution for evil which contributes to the advantage of him who exacts it." Aristotle, who omits punishment for the sake of an example, accepts only this third form, and that applied or corrected. This is employed "for the satisfaction of him who exacts it."[xiii]

LS: Then there comes a quote from Plutarch.

Reader: "'The punishments which immediately follow a crime not only restrain boldness and sinning for the future but also give the greatest comfort to those affected by the wrong.'"[xiv]

LS: They comfort, they console the man who has suffered. So there are three more reasons: the improvement of the criminal; the protection of society; and the third, the hurt man's pain must be comforted, must be appeased by pain inflicted on the criminal. Now this might very well go together with the two first in practice. He is guilty, and for the protection of society, he will be killed on his side; and this has the dual function that it also appeases the wrath or the pain suffered by the son of the murdered man. In other words, it is not necessary that you should have punishment in given cases based only on the motive of revenge, but the motive of revenge will enter.

Student: I would interpret it that he did not allow it at all.

LS: Let us follow that up. Here he speaks of it without any criticism. Now there is in the first place then this consolation of the hurt man, the element which has nothing to do with the protection of society. Whenever these cases are discussed—you know there is a case coming up every day, so to speak, either before the governor or before judges where the considerations of protection of society and of improvement (or they now call it rehabilitation) are considered, and yet when people have the feeling there is something else[5] they have a right to expect. Now in present day theory,[6] [vengeance] is completely

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[xii] *Vindicatio* can refer to any legal claim, not merely punishment or vengeance.

[xiii] Kelsey has "and that applied for correction, and says that this is employed 'for the satisfaction of him who exacts it.'"

[xiv] Translation: "'The punishments which immediately follow the crime not only restrain boldness in sinning for the future but also give the greatest comfort to those affected by the wrong.' " *JBP*, 2.20.6.1.

out and has lost its standing, and this has of course something to do with the philosophic tradition going back centuries,[7] [though] it took quite some time until it became immediately relevant for social and judicial practice.

The first point is clear. For the utility of the evil-doer—and no one can regard this as unfair or unreasonable, that a man who hurts others and in fact even himself should be prevented from doing that, should learn to be reasonable, by some useful coercion. It doesn't have to be spanking, formerly regarded as the most simple form of bringing a man to his senses, but to be shut off from many amenities—for example, from not being able to go when he wants to go to a bar, but [he] has to stick in a dull place where there are no bartenders, no amenities of this type.[8] [Deprivations.] Good. Now this kind of punishment, insofar as it consists of words, namely, by calling him names, and say he is not allowed to reply—this may in nature be inflicted by any man of judgment who does not suffer from the same vice. If he would suffer from the same vice, of course he has no right to do that. If he says "You drunkard" and he is himself drunk, there is a certain element of absurdity in that. Insofar as it consists of coercion, nature does not decide who may or may not inflict this kind of punishment. Paragraph 7, first section.

Reader: "The punishment which serves this end is by nature permitted to anyone of sound—"

LS: Rehabilitation.

Reader:

> anyone of sound judgment who is not subject to vices of the same kind or of equal seriousness, as is apparent from reproof that is administered verbally.
>
> To chide a friend for guilt-deserving blame
> Is a thankless task, however at times useful.
>
> However, in the case of corporal chastisement and other punishments which obtain an element of compulsion,[xv] the distinction between those who may or may not apply them is not made by nature (his would not be the case, except in so far as reason and trust is deterrence in a special sense exercises their right over their children on account of the type of relationship)[xvi] but by the laws which have limited that common connection of the human race to the nearest relationships for the sake of obviating quarrels.[xvii] This one may see from the section of Justinian's *Code* on the right of correction of relatives, and elsewhere.[xviii]

[xv] In original, not "which obtain"; "that contain."
[xvi] In original, not "for this would not be the case"; "for this could not be the case." Marked inaudible in the original transcript are the words "entrusts to parents in a special sense the exercise of this right."
[xvii] In original, not "the type of relationship"; "the tie of relationship."
[xviii] The words "section of Justinian's *Code* on the" and "relatives" are marked inaudible in the original transcript. *JBP*, 2.20.7.1.

LS: This kind of punishment may include capital punishment. If he is such an impossible fellow that it is certain beyond a shadow of reasonable doubt that he will go on in these ways, then you do him a favor, so to speak, by killing him, because then he will no longer lead this abominable life. If you take his whole life from the time of his adolescence, say he is forty years [old], and not a glimmer of anything reminding of some decency, of some sense that there might be rights of others, and great rights, not merely petty theft and pocket-picking, but murder.

Now we come to the next question, to revenge, which is now put into the center. If you want to be subtle, you have to observe that the order is now changed. In paragraph 6, section 1, we first had it as[9] [rehabilitation][xix], example, revenge, and now we discuss it[10] [rehabilitation], revenge, example. I mean I do not know whether this is[11] [intentional] in the case of Grotius. I do not know.

Student: You [inaudible] section 1 as an approximation to Locke's doctrine in that anybody[xx] . . . .

LS: We come to that. We find a very clear passage later, very soon. Now read paragraph 8, first section.

Reader:

> The advantage of him to whose disadvantage the wrong was committed consists in this, subsequently he may not suffer any such things from the same man or from others.[xxi] Gellius quotes from Taurus the following description of this kind of good:[xxii] "When the dignity or authority of him who has been wronged must be protected so that the neglect to inflict punishment may not make him despised and disgraced." What is said there with regard to injured authority must be understood to apply to the liberty of a person, or any other of his rights that has been transgressed.[xxiii]

LS: In other words, that is not revenge proper, but the protection of society altogether. Go on.

Reader:

> In Tacitus we read: 'Let him take counsel for his safety by a just revenge.'[xxiv]

[xix] In original transcript: "amendation"

[xx] Locke's law of nature gives to all the right to punish violations of the law of nature, while Grotius says nature does not determine who has the authority to punish. Strauss mentioned this in session 8 and again at the beginning of this session. *JBP*, 2.20.3.1.

[xxi] In original, not "subsequently he may not suffer"; "that subsequently he may not suffer."

[xxii] "Gellius quotes from Taurus the following" is marked inaudible in the original transcript. Not "this kind of good"; "this type of good."

[xxiii] The word "injured" is marked inaudible in the original transcript.

[xxiv] "Tacitus" is marked inaudible in the original transcript.

> To secure a man who has been wronged from suffering harm at the hands of the same person it is possible in three ways: first, by the removal of the wrongdoer—

LS: That of course could easily include capital punishment, if it[12] [does] not[13] mean *only* capital punishment.

Reader:

> second, by depriving him of the power to do wrongs;[xxv] finally, by teaching him to see through his evil ways, which is closely allied with the reformation that we have already discussed.[xxvi] He who has been wronged may be secured from harm by others, not by an ordinary punishment, but by one that is public and conspicuous and in the nature of an example.[xxvii]

LS: That is very dark, isn't it? But accept the emphasis on the honor and dignity of the hurt man. He is looked upon as a man to whom you can do whatever you like. His standing in the community is adversely affected by having been the victim of a crime and his standing must be restored. Is this not what he means?

At the end of paragraph 8 there is a quotation from Plato.

Reader:[xxviii] "warlike measures 'until the guilty shall have paid the penalty by those who have suffered innocently.'"[xxix]

LS: I think the reference here is to[14] [the guilty who] are compelled to pay punishment to the innocent ones who were affected with pain. I think that is the key point in revenge. A compensation of pain with pain, and this is a different consideration than that of the two others. I admit it; it's not very clear and the next example is punishment for the sake of an example. He may not be rehabilitated, but others may be deterred.

Student: Why do you emphasize pain?

LS: Because I try to understand simply what this third motive, which is so difficult for us to understand, precisely means. And then I find very clearly the reference to the pain of the hurt man and the pain of the condemned fellow—[15] the very thing which is in revenge, when people say "revenge is sweet." For years and years, they have waited—especially when you have these blood feuds in the Mediterranean, and there this is very strong. This sweetness of revenge, of which Homer also speaks, that is there. I have suffered the loss of my father or brother or whatever, and now I pay back, and your pain is sheer joy for me.

[xxv] In original, not "wrongs"; "harm."
[xxvi] In original, not "see through his evil ways"; "cease from his evil ways."
[xxvii] *JBP*, 2.20.8.1.
[xxviii] In the translation the first words of this selection are "Plato sanctions."
[xxix] In original, not "shall have paid"; "shall have been compelled to pay." *JBP*, 2.20.8.6.

Student: But does Grotius state that so starkly, or does he really say that you get comfort from punishment?

LS: The minimum which one would have to say is this. He would not approve of a punishment which does not also satisfy one of the two rational requirements: improvement of the criminal, or deterrence. He does not simply condemn the other as an accompaniment—in other words, it is intelligible, so to speak, to a fair judge that the hurt man feels this way. Whether this is sound from the highest point of view is another matter. But as we know, the judge cannot always look at man from the highest point of view.

Student: Is it convenient to remind just of what passage it was where Grotius spoke of pain per se rather than—

LS: Here there was pain at the end of paragraph 8. In the translation did it come out?

Student: No, it did not.

LS: But it is there. And you can always look up the passage in Plato to which he refers.

The other point which we read before, the consolation—that was in paragraph 6, section 1. And now example; I believe this does not need a special discussion except the beginning of paragraph 2. Section 2, I'm sorry.

Reader: "And the possession of the right to punish for this purpose also, according to nature, may rest with any person whatever."

LS: Anybody is by nature a lawful punisher in this respect.

Reader:

> Thus Plutarch says that the good man is appointed by nature to be a magistrate and indeed the perpetual one; for by the very law of nature leadership is conferred on him who acts justly.[xxx] Thus Cicero proves by the example of Nasica that no wise man can ever be a mere private citizen. (2.20.9.2)

LS: That's all we need. Do you see something? It's a very characteristic passage of Grotius. Every man is a judge; a good man and a wise man is a judge, as if these were the same. Now everybody may of course have the narrow meaning: it is understood that[16] [the punisher] has not committed the same crime. This does not make him a good man. He may not have committed adultery, but he may have committed murder. That's very simple.

Now the second is a classical thing. If the classics had speculated on the question of what would happen without the presence of civil society, then they would have said: Well, by

[xxx] In original, not "the perpetual one"; "a perpetual one."

nature the good and the wise are the ruler of the bad and unwise. But "everybody" is of course an entirely different view. Locke is consistent, Grotius is inconsistent. Locke says really everybody and he doesn't qualify it by good or wisdom. It is really a watershed which we have here. One can call it a watershed: in one way it goes down this way to Plato and Aristotle, and the other way goes forward to Locke, etc.

Student: When Grotius says something in his own right, it is closer to Locke.

LS: Sure, but there is this difference. Lawyers have to go into all kinds of complicated things under the limitations under which they[17] [operate]. We have in fact judges, not all of whom are of first-rate intelligence, and men of the greatest discernment and therefore some very rough[18] [approximation of wisdom and judgment] that's all right. But in the case of Grotius, this reaches into a greater height. He is not a commentator or interpreter of Roman law or Dutch law. This book is devoted above all to natural law, and these are natural law propositions, *i.e*., if we use the ordinary division of disciplines, this is meant as a philosophic, not as a legal[19] [doctrine]. That gives it its importance.

I think it is a confirmation of what we have observed hitherto about a certain lack of clarity regarding the principles in Grotius. I believe we will come soon, not today, to a much clearer formulation of that.

But I always found this passage very revealing in contrast with Locke. The transition from "everybody" to "every good man." Of course in a loose way you can say, speaking legally, everyone not proven guilty is innocent and hence good, but while this is for many practical purposes all right, it is of course an absurd assertion. I mean there are so many people who have never been proven guilty and can never be proven guilty because they have some excellent lawyers, but where everyone who knows them would not buy a second-hand car from them.

He speaks in the sequel in this paragraph of a special case of punishment, the judgment coming from zeal in the Old Testament especially, *i.e*., where these are not judgments for the sake clearly for the future good either of the individual or of society, but it is made clear in paragraph 11 that the New Testament surely does not quite share this view.

Student: I have a question regarding paragraph 9, where the quotation from Seneca reminds me of the spirit of Locke. I've always understood that as the spirit of Locke, when he talks about what happens to the[20] [violators] of the law of nature as somehow or other purely[21] [non-human], but I had also thought it was probably not typical of the classics.

LS: It is hard to say. If you take Aristotle's teaching regarding slavery as presented in the first book of the *Politics*, what is a slave? An animal, too.

Student: But not noxious.

LS: Of course not as such. But if he misbehaves, if he makes indecent gestures to the son or the daughter of the master, will he be treated—the master will treat him exactly as he would treat a horse or a dog.

Student: Dispatched like a slave.

LS: Let me put it this way. Francis Bacon says this very clearly somewhere in the *Advancement of Learning*. According to the Bible, man is created in the image of God. If we apply this biblical phrase to Plato and Aristotle, what would be the image of God? [22][The world], which behaves always regularly.[xxxi] I have forgotten now the precise wording of the phrase of Bacon. But surely Locke's statement is so striking because he bases his remarks on the Bible. Whoever sheds blood, whose blood will be shed again, for in the image of God was he created. But Locke is completely silent about the image of God when he speaks of punishment as though they can be treated like noxious animals.[xxxii] Locke's statement is not necessarily in radical contrast with the classical tradition: in addition, Seneca is the representative of that tradition and this would seem to settle that.

In paragraph 12, why there is no doubt that Christianity permits capital punishment? Christian rulers should imitate an Egyptian ruler who did not[23] [impose capital punishment] (paragraph 12, sections 2 to 3). So in other words, there were pagans too[24] [who showed mercy]. Christians are under stricter obligation. This does not mean of course that there should never be capital punishment. He does not go so far. You must not forget the situation. Whereas our age may suffer from an extreme of mildness (and whether one can call mildness an extreme is another question), the past generally speaking suffered from the extreme of harshness. The situation has radically changed. You find clear statements on this subject in Burke, and Burke speaks of this great change which has taken place in the eighteenth century, that the mild virtues which were called by the French philosophers at the time "*humanité,*" which is humanity, they are boosted. But the sterner virtues, which have as necessary a place in the cosmos of virtues as the mild ones have, are neglected.[xxxiii] The maximum of indulgence, of permissiveness as we say today, was thought to be the necessary consequence of humanity. This is the question, whether that is the true meaning of humanity. In other words, human virtue in general does not demand as much from us as well as from others to assert[25] [themselves] and not be permissive. Today it is in a way the most obvious moral question, because things have become much more extreme since the eighteenth century.

Student: Do you know how common capital punishment was on the continent at that time? An English law at that time[26] [imposed it for] all sorts of offenses—was that also true of Holland?

[xxxi] Bacon, *Advancement of Learning*, ed. G. W. Kitchin (Philadelphia: Paul Dry Books, 2001), Bk. 2, chap. 6, para. 1.

[xxxii] Locke, *Second Treatise* § 11.

[xxxiii] Perhaps Strauss has in mind one of the passages from Burke on "humanity" that he discusses in *Natural Right and History* (Chicago: University of Chicago Press, 1965), 300-301.

LS: Sure. If the defects on which European life suffered in the Middle Ages and early modern times was of too much harshness, especially for the people of the lower classes, naturally. If someone belonged to the nobility, he was assured a nicer treatment. One must never forget the motive of Hobbes in his whole legal philosophy, and that was humanity. When later on the prison reformer, the libertarian, this kind of thing [emerged], they were pupils of Hobbes. The [first] editor of Hobbes's [complete] works[27] was Sir William Molesworth, [who] belonged to Bentham's circle. They paid great attention to Hobbes's book about a dialogue between a common lawyer and the philosopher.[xxxiv] A very interesting book. It is a pity that this is not available in a paperback. It should be, because every law student should really read that.[28] [It] is very well argued and gives a presentation of Hobbes's philosophy from the point of view of law. Now such a simple thing which is not free from ambiguity, but which I always found revealing—that Hobbes says the judge, when handing down punishment, has to say clearly what is the[29] [finding and verdict], namely, you have been found guilty of this and this crime, and you are condemned to that and that punishment. He has no right to incite the defendant. I'm sure there were terrible judges who misused their authority; in the best case it would be a kind of sermon which the judge would address [to the defendant], a kind of moral admonition. But given human nature, one can say Hobbes was right: Don't sermonize, treat him as a human being. As [a judge], you are obliged [simply] to do and[30] say what you are compelled to say. That's enough for that poor fellow, do not add insult to injury. But [that] this thought would come to such a rebellious and[31] [revolutionary] fellow like Hobbes more than other people who had a broader moral horizon and were not so much concerned with this simple[32] [humanity, is striking]. Do you see that? There is no doubt that this development of the seventeenth and eighteenth centuries, starting, if we speak in broad and superficial historical terms, with the terrors of religious persecution all over Europe,[33] [when certain people] simply said: Let us reduce the harshness of human life as much as possible. Now they believed they derived some help from Roman law (I mean from the later imperial Roman law) and to a certain sense they did, but they went beyond it. Some things which we today take rather for granted were established by these people. It became a matter of public opinion and to some extent were embodied in law. But still, if we reduce it to its principle, it amounts to this: the virtues of indulgence and kindness were preached up with a kind of oblivion for the sterner virtues. In addition, this preaching up of kindness was based on a fundamentally narrow and false basis—this kind of self-preservation of which we have spoken before.

One can state the view [of these people] also as follows: men hitherto, whether philosophers or theologians, had aimed very high and look [at] what inhumanity of man to man has followed from it, either necessarily, or by practically inevitable psychological [causation]. Let us not aim high. Let us aim at the bare minimum. We will get rid of that unnecessary harshness of man to man. Religious toleration is of course the most obvious example, but it extends far beyond religious toleration. It concerns the whole of penal law, and what is now called liberalism is the hitherto last consequence of the movement. I think in the campaign that was a point which was so obvious,[34] [that the conservative]

[xxxiv] Thomas Hobbes, *A Dialogue Between a Philosopher & a Student of the Common Laws of England* in *The English Works of Thomas Hobbes*, ed. Sir William Molesworth (London: J. Bohn, 1840), 6:1-160.

tradition has to say: Well, how many things do the conservatives owe to the liberals? In the simple way, can Goldwater dare to oppose Social Security? This has become a part of modern life, the underdog, *humanité*, mixed up with other things but mainly with [sympathy for] the underdog. And of course a price has to be paid, and that is the point which our liberal friends are insufficiently aware of: the price which they have to pay. The question would be: Could one not have both the noble and high objectives of tradition, and some greater mildness and gentleness than went on ordinarily with the tradition, not with the highest representatives of the tradition, but with the practice which was not opposed [by the tradition]? I mean, Aristotle of course treats his slaves decently and would not have had any dealings with a man who was a brute, that goes without saying, but he did not even dream of starting a campaign for the abolition of slavery or even suggest that it might come about. As you know, this famous objection which people make to Plato and Aristotle and of course to Cicero, too.

I think it doesn't do us any harm if we remember for a moment that broad background even in which the trite phrases of Grotius take on [new] light.

Let us turn to paragraph 17, section 2. "But if the law."

Reader:

> But if the law regards the danger of subsequent harm arising from the deterring of punishment,[xxxv] it must be considered as contrary upon a private individual both right and public authority, so that he is no longer in a mere private capacity.[xxxvi]
>
> Such a law is the one in Justinian's *Code*, "When it is lawful for anyone without recourse to a judge to execute judgment for himself or for the public service,"[xxxvii] where permission is given to anyone at all to repress by punishment soldiers engaged in plundering. The following reason is given: "for it is better to intervene in time than to seek justice after the damage has been inflicted."

LS: Seek justice—that is in Latin *vindicare*, and I believe that is a better translation than revenge.

Reader: "'Therefore, we allow you to take vengeance for yourselves—'"

LS: *Ulcio*, which is revenge.

Reader:

[xxxv] In original, not "from the deterring of punishment"; "from deferring the punishment."
[xxxvi] In original, not "as contrary upon a private individual"; "as conferring upon a private individual."
[xxxvii] In original, not "'when it is lawful for anyone'"; "under the rubric 'when it is lawful for anyone.'"

> and because it is a serious thing to punish even by virtue of a judicial decision we have sojourned in the edict,[xxxviii] that no one shall spare a soldier whom he ought to oppose with arms as a robber."
>
> A similar law, again, is the one which follows, dealing with the suppression of deserters, which says: "That all men know that against public robbers and deserters for military service, they have been granted the right to exercise public vengeance for the common peace."[xxxix] The remark of Tertullian is here important : "Against traitors and public enemies every man is a soldier."[xl]

LS: This sounds like Locke but it is qualified. Every man is the judge, but not in all cases. You see the use of the word *ulcio* here to indicate that there is a certain[35] [vengeance involved].

Now in paragraph 18 he turns to a crucial point. What kinds of acts are [not] punishable by human law? Answer: merely internal acts, mere designs. Someone—to take a favorite example from the movies, if someone only thinks "I kill you," he is certainly not punishable. If he says "I kill you," it will be used of course at the next opportunity when this fellow has been careless, to prove that he killed him. So the mere design as such is not punishable by human law.

Nor, [in] paragraph 19, acts inevitable to human nature. In other words, acts which are forbidden but which are not expected to be avoided[36] [by] an ordinary human being. I suppose a case would be that if a coquette arouses a desire by a man and under circumstances, say, they have drunk, there would be a line that one could say: Can you swear that you would have resisted[37] [this temptation]? He must have meant something of this kind. Murder, I think, would never fall under that. Nor acts which do not concern human society or any other man. Paragraph 20, section 1.

[change of tape]

Reader:

> In the third place we are not to punish sins which neither directly nor indirectly affect human society or a fellow man. The reason is that there is no cause for not leaving such sins to be punished by God, who is most wise in perceiving them, most just in judging them, and most able to requite them. For men, therefore, to institute punishment for such acts would be clearly futile, and consequently inadequate.
>
> From this broad statement we must except corrective punishments, the purpose of which is to improve the sinner, even although perhaps this does not concern others. And further, we are not to punish actions which

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[xxxviii] In original, not "sojourned"; "subjoined."

[xxxix] "'Let all men know'" in the translation.

[xl] "Tertullian" is marked inaudible in the original transcript. Not "is here important"; "is here in point." *JBP*, 2.20.17.2.

> are contrary to the virtues in regard to which nature rejects all compulsion, such as mercy, liberality, and gratitude.[xli]

LS: An enforced gratitude is no longer gratitude. If you have a legal obligation to your benefactor, which he can enforce, then of course you are not truly grateful. You pay your debt. That's clear.

At the end of paragraph 21, read the last sentence.

Reader: "This furthermore, may be true both prior to the laying down of penal law and subsequent to it."[xlii]

LS: He does not use the expression state of nature where it would have been naturally used by later writers. Paragraph 29, section 2. In the note of that there is a quote from[38] [Philo].

Reader: "For all affections of the mind are severe and influence it and disturb it an unnatural manner[xliii]—"

LS: They move the mind outside of its natural state. [I mention this] only as an example of the state of nature in Grotius. The state of nature is a normal, healthy state. It has nothing to do with the Hobbean definition. I think it is now certain that the state of nature plays no role of any importance in Grotius.

Student: You mentioned that he didn't use the term "state of nature" at the end of paragraph 21, but the translator uses an expression which sounds like it at the beginning of 22. The first sentence—"because the wrongdoer is naturally in the state where punishment may be permitted . . . . "

LS: The existence of the term [*status*], which made it wholly unnecessary—what does he say? There can be no doubt prior to the establishment of penal law; there could[39] be [no] place for punishment, because by nature he who commits a crime [is] in[40] [the] status[41] that he could justly be punished. It would be much simpler to say "in the state of nature," but the fact that he does not use the term is in itself highly characteristic. While this may seem to be a merely verbal or[42] [terminological] thing, it throws light on a very substantive change. The term came into use because it was absolutely necessary, and one could make here the more[43] [sensible arguments] of this new school without speaking specifically of the state of nature.

[xli] This selection is not in the original transcript. *JBP*, 2.20.20.1.
[xlii] *JBP*, 2.20.21.1.
[xliii] This full text of the note mentioned by Strauss has been taken from the print edition of the translation: "Philo, *On the Ten Commandments* (28), says: 'For all affections of the mind are severe, and influence and disturb it in an unnatural manner, and do not permit it to be healthy. But the most severe is desire; for each of the other affections attacks and falls upon the mind from without, and seems to be involuntary, but desire alone has its beginning in ourselves and is voluntary.'"

The term has emerged earlier, or something like this thought, but it was marginal. Now when what was formerly marginal becomes central, that is not a quantitative change only, but a qualitative change. Is this clear? Let us make this[44] [illustration]. [LS writes on the blackboard] Here there is a circle and here is the center, and here is something marginal. It comes up in a limited way and is useful for certain purposes. Then it comes here and plays somewhat a greater role. Here it is a quantitative change. But when it is here, the whole thing has changed. Qualitative changes cannot be reduced to quantitative changes. You can't say of a man that he is a little bit dead. You cannot say of a girl that she is a little bit pregnant. Here they are qualitative differences. The moment this decisive event happens and something new has emerged: that is in a way the simple point for which Plato and Aristotle stood. It was restored by Hegel in the form which I stated it now. From a certain moment on, the quantitative change turns into qualitative change. And this was then taken over by Marx.

In paragraph 30, he speaks of the principles governing the various punishments, the gravity of the crime, and what constitutes the gravity of the crime. Here in the third section, we come to that point which we have to consider for fair judgment, not only the nude, bald act, but the consequence. Will you read paragraph 30, section 3.

Reader:

> In addition to injustice, which we have stated is the general reason for abstaining from wrong, there is sometimes added another vice, as in piety towards one's parents,[xliv] cruelty towards neighbors, and gratitude to benefactors, [xlv] which adds to the seriousness of the offense. Also, the depravity appears to be greater if one sins frequently, because evil habits are worse than evil acts.
>
> From this we may see how far the Persian custom is by nature right, which takes into consideration a man's former life along with his crime. This ought, to be sure, to have a place in the case of those who, while not otherwise prone to evil, have suddenly been carried away by some charm felt in sinning;[xlvi] but not in the case of those who have changed the whole character of their life. Regarding them, God himself, according to Ezekiel, says no account must be taken of their previous life.[xlvii] We may also apply to them words of Thucydides: "They are worthy of the twofold penalty, because from good men they have become bad"; and also what he has said in another place, "Because at least of all became them to sin."[xlviii]

[xliv] In original, not "in piety"; "impiety."
[xlv] In original, not "gratitude to"; "ingratitude toward."
[xlvi] The words "charm felt in sinning" are marked inaudible in the original transcript.
[xlvii] In original, not "no account must be taken"; "that no account must be taken."
[xlviii] "Because at least [inaudible]" is in the original transcript. "Because it least of all became them to sin" is in the translation. *JBP*, 2.20.30.3.

LS: So you see this does not simply work in the mitigating manner in which it is understood[45] [nowadays]. Say a crime is committed, and every fair judge would say that you cannot look at the mere crime: we have also to consider the circumstances. Slum, broken home—you know the long list. This is a kind of broader concern which is now familiar. In Grotius it is much more open-ended. There are also other considerations: for example, if he comes from a very good home and has a very good education, and then he commits such a heinous crime, it is an aggravating circumstance. This would be one case. And another case: this is a man of perfect integrity throughout his life, and then he succumbed to the lure of that terrible woman, then the overall nature of his life mitigates, if it does not cancel out, the crime he committed and his punishment.

Student:[46] [Maybe the] distinction reflects[47] [mercy], the application or non-application of punishment[48] [given the person's character].

LS: No, I think the degree of punishment. He does not imply that there should not be punishment, but it is an attenuating, or in the other case aggravating, circumstance. I don't believe that he says no punishment. He doesn't speak here about capital punishment in particular, but of punishment in general. This, I believe, would exclude your interpretation.

Paragraph 32—punishment may inflict a greater pain than the criminal inflicted. Let us read the end of the first section of paragraph 32.

Reader: "Seneca, speaking of the judgment after this life, says; 'our sins are weighed with heavier measure.'"[xlix]

LS: What is the context? Let us read perhaps the second half of this section so we can have the context.

Reader:

> "The laws," says Ambrose, "order that those things which have been taken away from anyone with injury to the person or the thing itself shall be restored with interest, so that either they may deter the thief from taking them by the punishment provided, or recover the loss by the fine." According to Aristides in his second speech *On Leuctra*: "Those who follow up their wrongs in court are allowed by the law to inflict upon those who have wronged them, in the way of punishment, more than they have suffered."[l]

LS: Paragraph 34 is also I believe very relevant to this question.

Reader:

> But within the conceded limits, regard for him who is punished tends to exact the minimum penalty, unless a more just regard for the greater

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[xlix] In original, not "'our sins are weighed'"; "'your sins are weighed.'"

[l] The title "*On Leuctra*" is marked inaudible in the original transcript. *JBP*, 2.20.32.1.

> number urges a contrary course or an expensive reason.[li] This reason is sometimes to great danger from him who has sinned, but more often in need of an example.[lii] This need, moreover, usually has its origin in the general inducements to sin, which cannot be checked without sharp remedies. Of these inducements, the strongest are habit and opportunity.[liii]

LS: This should be studied by everyone, however much in love with harsh and strict punishment. So in other words, for reasons of charity, *caritas*, habits of criminality and eagerness of committing crime is a reason for charitably increasing crime—I mean increasing punishment. Is this not what he says? *Iustior caritas*, a more just concern with our fellow men, may induce us to . . . .

Student: [Inaudible]

LS: Is this not so, that a man who would inflict a penalty on a man without a good reason is clearly a nasty fellow? But if there are good reasons, then no blinking.

Student: At the end of paragraph 32, he also notes that although death is the ultimate punishment, you can always throw in torture for very great crimes.

LS: Sure. That was the reason why in former times, say, in Europe in the early nineteenth century,[49] [parricides] were punished with special torture. The distinction has now been completely abolished, and the only difference which remains[50] [is that the murderer of a policeman] is regarded as the more serious than the ordinary criminal. I think this change from the father-killer to the cop-killer speaks for itself. From a morality of reverence to a morality of expediency, because the whole security depends on the fact that the police officers have a reasonable security that criminals are more afraid to kill a cop than another human being.

Paragraph 35 is also very interesting.

Reader:

> Because of the opportunity, the divine law given to the Jews punished more severely a theft committed in the field than one in the house.[liv] Justin, writing of the Scythians, says "Among them no crime is considered more serious than theft, for, if stealing were permitted, what would they hold safe, seeing that they keep their flocks and herds without the protection of group and walls."[lv]

[li] In original, not "or an expensive reason"; "for an extrinsic reason."
[lii] The translation: "This reason is sometimes the great danger from him who has sinned, but more often the need of an example.
[liii] *JBP*, 2.20.34.1.
[liv] In the translation the reference "(Exodus 22:1, 9)" is inserted at the end of this sentence.
[lv] In original, not "group and walls"; "roof and walls" in the translation. In the original transcript "walls" is marked inaudible. *JBP*, 2.20.35.1.

LS: It is a good key to the Western movies regarding horse thieves. Under certain conditions, the stealing of a horse may be a[51] [capital] crime.

In paragraph 38 he turns to the issue of punitive wars. The most important paragraph is paragraph 40, in which he discusses what now might be called wars of civilization, where a civilized nation subjugates a barbaric nation in order to civilize it. But this is here understood in different terms. A nation committing atrocious crimes, say, cannibalism—does not a civilized nation have the right to take over and prevent them from cannibalism? That is a very long question and here we are again at a watershed. What does modern international law say?

Student: No, there is no right to reform.

LS: If they burn their widows, it's their business. That is called non-intervention. Intervention is strictly forbidden. Grotius proves by overwhelming evidence that he follows in this respect the ancients. The ancients regarded wars of civilization perfectly all right. I mean, they may not have regarded it as expedient for one reason or another, but there was no question [that] to prevent atrocious crimes, you may wage war.

And then there came a big change, very different from Hobbes and his precursors, and these were some very decent Spanish priests, theologians, and with a view to what happened in South America, in Mexico. The atrocious crimes committed by the Spaniards, claiming they inflict these things on these poor fellows on the ground of Christianity; but the case in Mexico was a bit different because they had human sacrifice. But these men who are now regarded as the founders of international law in the common view, their books have been reprinted in this Carnegie series.[lvi] Now confronted with this disgraceful thing, they simply said: No, there is no right of intervention. In the case of attack, naturally, but then it doesn't have this ground. If the Mexicans had come over to Spain, the Spaniards would have been free to[52] [resist]. Now this has some very decent reasons, to prevent gross hypocritical abuse of society. Later on, and on the entirely new foundation laid by Hobbes, this became the principle of international law: that every state, says the Hobbean formulation, is in a state of nature in regard to any other state, i.e., that meant for Hobbes that a state can of course attack another state, conquering it and whatever it likes, but he can do it only on the ground of simple and honest hostility.[lvii] Hobbes was naturally somewhat extreme; the more common view was that there is no right of intervention in domestic affairs. If there is an abominable tyrant ruling

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[lvi] Strauss is doubtless thinking primarily of Francisco de Vitoria (or Franciscus de Victoria, c. 1486-1546). "This Carnegie series" is the series that published the Grotius text used in this class, as well as an anthology of Vitoria's writings. James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations*, Publications of the Carnegie Endowment for International Peace, Division of International Law (Oxford: Clarendon Press, 1934).

[lvii] See *Leviathan*, chaps. 13, 17.

state A, can state B, not for reasons of sheer compassion with the oppressed people in state A, not take action? According to classic international law, he cannot.[lviii]

There is a beautiful discussion in a very funny form of this question in Robinson Crusoe, the relation of Robinson Crusoe to these cannibals. Can you state the problem again?

Student: He first is horrified at the kind of way[53] [Christians were] attacking them for the good of their souls . . . .

LS: Demagogues.

Student: Almost quoting [inaudible], he said I have no right unless I'm attacked. The only right stems from his self-defense, but he extends his self-defense into a form of anticipation and he finally attacks them on [the] Hobbean grounds that he needs to improve his preservation.

LS: But the first decision is that one, non-intervention. They may slaughter and eat their prisoners of war as they like. It is none of his business. The moment they attack him . . . . This is along with the modern view. The older view is the one which lends itself easily to gross abuse and permits a war of civilization. You can say it's a service to humanity, but it is obvious[54] [that] in most cases the conquerors are very little concerned with improving the morals of the conquered, but with exploiting them.

Student: The true religion could not be used as the reason . . . .

LS: That he makes clear. The general thesis is clear. Wars of civilization are not as such commutative wars, are not permitted.

Student: You do conclude that according to the law of nature one nation may leave another suppressed by a tyrant?

LS: Tyrants are a special case. We have seen that. His general fear [is] of instability, but I would suppose in the case of very gross bestiality on the part of the ruler and the general feeling of the whole population, and they simply are not able to[55] [rebel] from a military point of view, I believe he would admit that.

Student: [Inaudible]

LS: But of course the question of tyranny and fighting barbarous races are not quite the same. And you made a very apt point that this is very simple to say for Grotius because this is not Europe, it's far away from home. The intra-European causes for wars were very different kinds. He faces them however because [of] the question of religion.

[lviii] "Classic international law" here means the positivist tradition, rooted in Hobbes, that came to dominate in the nineteenth century.

In paragraph 40 in the first three sections where he states the argument, almost all authorities are pagan. Only one is holy. Let us read section 4, paragraph 40.

Reader: "Thus far we follow the opinion of Innocent and others who say that war may be waged upon those who sinned against nature."

LS: *I.e*, against nature, who transgressed natural right. [Regarding those] who transgressed divine law—that's a long question. This was the older view.

Reader:

> The contrary view is held by Victoria, Vazquez, Azor, Molina, and others who in justification of war seem to demand that he who undertakes it should have suffered injury either in his person or in his state, or that he should have jurisdiction over him who is attacked.[lix] For they claim that the power of punishing is the proper effect of civil jurisdiction, while we hold that it also is derived from the law of nature; this point we discussed at the beginning of the first book. And in truth, if we accept the view from those with whom we differ, no enemy will have the right to punish another, even after a war that has been undertaken for another reason than that of inflicting punishment.

LS: Hobbes admitted that, of course, that the enemy has no right to punish. He has the right to do anything that he sees fit, but he cannot call it punishment. That is out. This is clear. But during Grotius' time and the generation before, very few people, hardly anyone, would take this step.

Reader:

> Nevertheless many persons admit this right, which is confirmed also by the usage of all nations, not only after the conclusion of war, but also while the war is still going on; and not on the basis of any civil jurisdiction, but of that law of nature which existed before states were organized, and is even now enforced in places where men live in family groups, and not in states.[lx]

LS: I think he makes the issue quite clear. The right to punish is not an effect of civil jurisdiction, but stems from the right of nature directly, which antedates civil society.

There is in his writing on the freedom of the seas, at the end of the second chapter a remark.[lxi] What else is here? In paragraph 43 we must come to the key point, the religious wars.

[lix] "Vazquez, Azor, Molina" is marked inaudible in the original transcript.

[lx] *JBP*, 2.20.40.4.

[lxi] At the conclusion of the second chapter of *The Freedom of the Seas,* Grotius argues that neither religion nor alleged barbarism may justify war. *The Freedom of the Seas*, Carnegie Endowment for International Peace, Division of International Law (New York: Oxford University Press, 1916), 13-14).

Reader: "And for this reason . . . . [lxii] Plutarch says that there are certain 'diseases and sufferings of the mind which cause a man to lose his natural character.'"[lxiii]

LS: ["Natural character" here is] natural state, *status naturalis*. Now paragraph 44 is crucial. That concerns religion. Punitive wars cannot be made or waged on religious grounds. He gives first a discussion of the subject on grounds which he regards as insufficient. Let us read the beginning of the paragraph.

Reader:

> Our order of treatment has brought us to the discussion of crimes which are committed against God; for there is a dispute whether war may be undertaken to avenge these. This question has been treated at sufficient length by Covarruvias. But he, accepting the position of others, thinks that the power to punish does not exist apart from jurisdiction, properly so called. This view we have already rejected.[lxiv]

LS: In practice this means of course something like a papal decision is required, because a secular government cannot well decide that. Grotius however believes there is a natural right to punishment, not[56] [derivative] from any jurisdictional position, and therefore he has to face it.

Reader: "Consequently, just as in the affairs of the Church, the bishops are said in some way to have been 'entrusted with the care of the Universal Church,' so kings, in addition to the particular care of their own states, are also burdened with a general responsibility to human society."

LS: He is a Protestant. That is a simple explanation for this change.

Reader: "A stronger argument for the view which denies that such wars are just is this, that God is able to punish offenses committed against Himself, whence the saying 'The injuries of the gods are the care of the gods' and 'perjury has a sufficient avenger in God.'"[lxv]

LS: You see the easy transition from the singular to the plural, and that is easily explained—pagan writings used by Christians—but it has of course a great implication. These pagan writers are authorities for natural law, and the natural law regarding religions is very much concerned with whether[57] [monotheism] is a rational insight and the question: Can there be a just war against a nation merely on grounds of politics or idolatry? Is [this] not altogether the practical meaning?

[lxii] "Aristotle compared barbarians, who err through want of training in such things, to men having desires corrupted by disease." This text was omitted from the original transcript.
[lxiii] *JBP*, 2.20.43.2.
[lxiv] "Covarruvias" is marked inaudible in the original transcript.
[lxv] *JBP*, 2.20.44.1.

Reader: "We must, however, recognize the fact that this same thing may be said about other crimes as well. For without doubt God is able to punish these also, and yet no one disputes that they are rightly punished by men."[lxvi]

LS: And hence there is no reason why man should not have the natural right to punish crimes against God. That is the point. Now what is the true reason? So in other words, this reason is not good enough which he discussed here.

In the sequel, he develops in[58] sections 2 and 3 that religion is of the essence of society, or as we would say, of civilization, and therefore an irreligious nation threatens civilization and therefore it is not a good ground of war, of a punitive war. There is a quote from[59] [Josephus] in the note here.

Reader:[lxvii] "these reasons why many states are badly organized: 'Their lawgivers did not know from the beginning the true nature of God, and, not reaching a clear knowledge of what they were able to comprehend, did not in the light of this give another form to their constitution.'"[lxviii]

LS: The beginning of section 4.

Reader: "And all these things are to be taken into account not merely in any one state, as when, in Xenophon Cyrus says that his subjects will be more devoted to him the more they fear the gods, but also in human society generally."[lxix]

LS: It is very interesting here. It is in the Latin here: the more they fear God, in the singular, and in the English translation—well, there may be another English text. That only is a minor curiosity.

Now the key point of this argument is not so simple, that religion is of no concern to natural right because religion is of the essence of society. Justice presupposes piety and in particular[60] [belief] in providence,[61] [divine rewards and punishments]. Of course, [this is] of special importance[62] for international justice. Think of the sanctity of oaths. So there is a side for religious wars, but what is the side against that?

The difficulty was indicated somewhere in paragraph 44, by the fact that he used a singular and plural god in his premises, indicating at least the great question of, say, the Romans, the Greeks—are they barbarians. That is not so simple. Now let us see what the answer is. Paragraph 45, first section.

Reader:

[lxvi] *JBP*, 2.20.44.2.
[lxvii] "So also Josephus, in the second book *Against Apion* (2.35), gives" begins the passage in the translation.
[lxviii] *JBP*, 2.20.44.3 (n. 2).
[lxix] "Cyrus" is marked inaudible in the original transcript. *JBP*, 2.20.44.4.

> To penetrate more deeply into the whole matter we must observe the true religion, which is common to all ages, rests mainly on four principles. Of these the first is, that God is, and is One; the second, is that God is none of the things which are seen,[lxx] and is something more exalted than these;[lxxi] the third, that God has a care for human affairs, and judges them with the most righteous judgment; and the fourth, that the same God is the creator of all things besides Himself. These four principles are likewise set forth in the commandments of the Decalogue.[lxxii]

LS: This is the true religion common to all ages. Now what [does] he mean by that? He knew much better than anyone here how[63] [uncommon belief] in the unity of God or in God's making the universe was among the Greeks and the Romans. In what sense could it have been common? Whether there were some individuals, say, Plato and Aristotle, who shared this view—but of course that is a complicated matter. Because otherwise, why does he insist on its being the true religion common to all ages? He doesn't say this for nothing. Well, if they did not have an inkling of their[64] [error], then they are of course not guilty in denying it and therefore they cannot be punished. They can be only taught but not more.

Student: Would these principles be common to Christianity, Islam and Judaism?

LS: Yes. Sure. I think every Jew and every Muslim would subscribe to that as a matter of course. I don't know Grotius' theological writings, but it is possible that he presented that as a natural, rational religion in some of his writings. I do not know.

In section 3 to 4, this seems to suggest that piety, both in its comptemplative and practical aspects, belongs to the *ius gentium*. In 46,[65] section 3, he quotes the Roman lawyer[66] [Pomponius] who surely regards religion as belonging to the *ius gentium*, which means, if it is strictly meant, not to the *ius naturale*.

What is the heading of paragraph 46?

Student: I see a problem here because I see that Julian is mentioned in the notes—

LS: Frequently.

Student: And how would Grotius distinguish between, say he had to make a judgment upon the true religion on the basis of this definition of God versus [inaudible]?[lxxiii]

[lxx] In original, not "is that God is none of the things"; "that God is none of the things."
[lxxi] In original, not "and"; "but."
[lxxii] *JBP*, 2.20.45.1.
[lxxiii] "Julian's," it seems, from the context. Julian "the Apostate" (331-363) became emperor of Rome shortly after Constantine, repudiated Christianity and (briefly) reinstituted paganism. He wrote polemics against Christianity.

LS: But the true religion might very well be accessible to Julian. True religion as known to all ages, this is not the same as the true religion simply. Is this not clear? This would, I believe, make no difference.

What is the heading of paragraph 46?

Reader: "*Those who first do violence to these common ideas may be punished*"[lxxiv]

LS: Therefore, as explained in paragraph 46, the originators of atheism are punishable, because they knew better, but their descendants no longer because they were brought up under atheism.

Now the case of paragraph 47, first section, is slightly different.

Reader:

> Other ideas are not equally edited , as, for example, that there are not more gods than one;[lxxv] that none of the things which we see is God, neither the earth, nor the sky, nor the sun, nor the air; that the earth is not from all eternity nor even its matter, but that they were made by God. Consequently we see that the knowledge of these things has disappeared among many people through lapse of time, and is as it were extinct; and the more easily so because the laws gave less attention to these ideas, seeing that some religion at any rate could exist without them.[lxxvi]

LS: In other words, there is no right to punish nations not believing in creation and so on. The key point concerns the present situation in seventeenth-century Europe, among the warring Christian nations. Paragraph 48, the first section.

Reader:

> What should we say about those wars that are waged against certain peoples for the reason that they have refused to embrace the Christian religion.[lxxvii] I shall not discus here whether the religion proffered was just as it ought to be, or whether it was proffered as in the manner in which it ought.[lxxviii] Let us grant that it was; then we say that two things must be taken into account.
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> The first is that the truth of the Christian religion, insofar as it makes a considerable addition to natural and primitive religion,[lxxix] cannot

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[lxxiv] *JBP*, 2.20.46.
[lxxv] In original, not "edited"; "evident."
[lxxvi] *JBP*, 2.20.47.1.
[lxxvii] "What shall we say of those wars that are waged against certain peoples for the reason that they have refused to embrace the Christian religion when proffered to them?" The words arranged by Kelsey in the form of a question are these.
[lxxviii] The words "in the manner in which it ought" are marked inaudible in the original transcript.
[lxxix] The original transcript has "insofar as it ray [inaudible] in primitive religion." The translation has "insofar as it makes a considerable addition to natural and primitive religion."

> be proven by purely natural arguments, but rests upon the history both of the resurrection of Christ and on the miracles performed by Him and by His Apostles. This is a question of fact, proven long ago by a reputable testimony,[lxxx] and of fact already very ancient. Whence it results that this doctrine cannot be deeply received in the mind of those who here and now for the first time,[lxxxi] unless God secretly lends his aid. This aid, when given to any person, is not given as a reward of any work; so that if it is denied or granted less generously,[lxxxii] this occurs for reasons that are not unjust indeed, but are frequently unknown to us, and hence not punishable by the judgment of man.[lxxxiii]

LS: Christianity is partly trans-rational and therefore it cannot have evidence which the natural religion originally possessed, therefore there is no basis for persecution on this ground. Let us read in conclusion only the heading of paragraph 49.

Reader: "*Wars are justly waged against those who treat Christians with cruelty for the sake of their religion alone*"[lxxxiv]

LS: If, say, the emperor of China or Japan does not permit the entry of Christian missionaries, that is a just cause of war, but not the fact that he refuses to permit a Christian as such. Further than that, Grotius cannot go.

Student: I think that his teaching on God, the ideas of God, to start out by saying God is one and omnipotent, and these are the requirements, that he now collapses—

LS: Not quite. The question is: Can it be expected now in the seventeenth century that a fellow in southern India would know this truth? The people who corrupted them and who brought in these terrible Hindu[67] [myths], they are guilty. But they are no longer alive. These are the heirs, the descendants, and they are not punishable.

Student: But a belief in God or some kind of god still remains. One cannot be an atheist, even now.

LS: Yes. At least I have found no evidence for that. Or is there any passage where he says even an atheistic nation may not be compelled to accept some religion? But the key point was: What should be done in the Spice Islands, in other places which have undergone some changes in the past, in India, in South America, and so on? These were the questions, and he tries to take away every ground of [war based on] religion or pretended religion. But Grotius accepts the situation in Europe at that time.

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[1] Deleted "that and."
[2] Deleted "but."

[lxxx] In original, not "a reputable testimony"; "irrefutable testimonies."
[lxxxi] In original, not "here and now"; "hear it now."
[lxxxii] In original, not "less generously"; "less generously to any."
[lxxxiii] *JBP*, 2.20.48.1.
[lxxxiv] *JBP*, 2.20.49.

[3] Deleted “the.”
[4] Deleted “[inaudible].”
[5] Deleted “to which.”
[6] Deleted “it.”
[7] Deleted “and.”
[8] Deleted “degradations.”
[9] Deleted “amendation.”
[10] Deleted “amendation.”
[11] Deleted “reasonable.”
[12] Deleted “is.”
[13] Deleted “meant to.”
[14] Deleted “those who are in guilt.”
[15] Deleted “after all.”
[16] Deleted “he.”
[17] Deleted “are.”
[18] Deleted “. . . .”
[19] Deleted “[inaudible].”
[20] Deleted “defenders.”
[21] Deleted “non-Christian.”
[22] Deleted “[inaudible]”
[23] Deleted “punish (inaudible).”
[24] Deleted “[inaudible].”
[25] Deleted “himself.”
[26] Deleted “[inaudible] and.”
[27] Deleted “up to the present-day.”
[28] Deleted “this.”
[29] Deleted “[inaudible].”
[30] Deleted “simply.”
[31] Deleted “delusionary.”
[32] Deleted “[inaudible].”
[33] Deleted “and then.”
[34] Deleted “[inaudible].”
[35] Deleted “[inaudible].”
[36] Deleted “from.”
[37] Deleted “[inaudible].”
[38] Deleted “[inaudible].”
[39] Deleted “not.”
[40] Deleted “that.”
[41] Deleted “so.”
[42] Deleted “tetiological.”
[43] Deleted “sentimental resort.”
[44] Deleted “illustrative.”
[45] Deleted “nova.”
[46] Deleted “My.”
[47] Deleted “[inaudible].”
[48] Deleted “[inaudible].”
[49] Deleted “[inaudible].”
[50] Deleted “[inaudible].”
[51] Deleted “criminal.”
[52] Deleted “. . . .”
[53] Deleted “[inaudible].”
[54] Deleted “because.”
[55] Deleted “do it.”
[56] Deleted “deliberative.”
[57] Deleted “monotheists.”

[58] Deleted “paragraphs.”
[59] Deleted “[inaudible].”
[60] Deleted “believe.”
[61] Deleted “[inaudible].”
[62] Deleted “of religion.”
[63] Deleted “little common, you believe.”
[64] Deleted “trouble.”
[65] Deleted “paragraph.”
[66] Deleted “from [inaudible].”
[67] Deleted “[inaudible].”

Session 10: November 4, 1964

Leo Strauss: We have not yet discussed chapter 21, which deals with the communication or contagion of punishment. In other words, how much are people who did not commit criminal acts responsible, say, Hitler or his friends, or the simple German people? Let us look at paragraph 1, section 2. Who are the people who are responsible?

Reader:

> Therefore, those who order a wicked act, or who grant to it the necessary consent, or who aid it, or who furnish asylum, are those who in any other way share in the crime itself;[i] those who give advice, who pray, or approve;[ii] those who did not forbid such an act although bound by law properly so to permit it,[iii] or who do not bring aid to the injured although bound to do so by the same law; those who do not dissuade when they ought to dissuade; those who do not conceal the fact which they are bound by some law to make known—all these may be punishable, if there is in them evil intent sufficient to deserve punishment, according to the discussion which immediately precedes.[iv]

LS: Is this clear? I think this is a reasonable statement. How this will work out in practice is another matter. We must read the next paragraph.

Reader:

> The matter will become clearer in the illustration. A civil community, just as any other community, is not bound by the acts of individuals, apart from some act or neglect of its own. Augustine well says:[v] "The particular sin committed by the individual is one thing,[vi] and differs from a common sin, which is done with one mind and one will, when the multitude has been united for some purpose." Hence, we find the formula for treating a clause 'if he has violated this by public agreement.'[vii]

LS: In other words, if the people assembled would have made the decision, there can be no doubt that they would have the responsibility.

Reader:

> According to Livy, the Locrians showed the Roman Senate that the blame for their defection did not rest with the public will.[viii] The same author

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[i] In original, not "are those"; "or those."
[ii] In original, not "who pray"; "who praise."
[iii] In original, not "by law properly so to permit it"; "by law properly so called to forbid it."
[iv] *JBP*, 2.21.1.2.
[v] "For Augustine well says" is from Kelsey's translation.
[vi] In original, not "by the individual"; "by the individual in a state."
[vii] In original, not "the formula for treating a clause"; "in the formula for treaties the clause."
[viii] "Locrians" is marked inaudible in the original transcript.

> relates that Zeno,[ix] who interceded for the Magnesians with tears, besought Titus Quintius and the delegates who accompanied him[x] "not to blame the state for the madness of one man: Each man's folly should be a parable unto himself."[xi] And the Rhodians, in the presence of the Senate,[xii] separated the public cause from the cause of individuals:[xiii] "there is no state which does not have wicked citizens sometimes, and an ignorant populace all the time."

LS: Ignorance is an excuse.

Reader: "So the father is not bound by the wrongdoing of his children, nor the master by that of his slave, nor any others of superior station,[xiv] unless they themselves make manifest something blameworthy of themselves."[xv]

LS: What is the simple principle on which that decision is based? There cannot be collective guilt proper. There can be a guilt of all individuals of a given society, but [this is the guilt] of each, [not of all collectively]. That is the principle of justice as we all know it. If someone is dissatisfied with it—and the German case is the best known in our age; to the extent to which there is a collective guilt of the Germans, they have been punished for that. They lost being a first-rate power. If they had not followed Hitler and had been a little more patient, they would have been the leading European nation, and that would have been a great reward. And the punishment comes from the fact that they have been condemned to be at best a second-rate power. But these are not judicial decisions. The same paragraph, section 4.

Reader:

> But, as we have said, to participate in a crime a person must not only have knowledge of it but also have the opportunity to prevent it. This is what the laws mean when they say that knowledge, when its punishment is ordained, is taken in the sense of toleration, so that he may be held responsible who was able to prevent a crime but did not do so; and that the knowledge to be considered here is that associated with the will, knowledge is to be taken in connection with intent.[xvi]
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> Consequently, the master is not to be held responsible in case the slave has formally claimed his freedom, or if he has treated his master with contempt; for surely he is blameless who knows of an intended

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[ix] The words "that Zeno" are marked inaudible in the original transcript.
[x] The original transcript has "who interceded with the [inaudible] and the delegates who accompanied him." The translation has "who interceded for the Magnesians with tears, besought Titus Quintius and the delegates who accompanied him."
[xi] In original, not "parable unto himself"; "peril unto himself."
[xii] "And the Rhodians, in the presence of the Senate" is in the translation. "And the [inaudible] before the public Senate" is in the original transcript.
[xiii] In original, not "the cause of individuals"; "the cause of individuals, saying."
[xiv] In original, not "of superior station"; "of superior station [by crimes of inferiors]."
[xv] In original, not "of"; "in." *JBP*, 2.21.2.1.
[xvi] In original, not "knowledge is to be taken"; "that is, knowledge is to be taken."

> crime, but is unable to prevent it. Thus parents are responsible for the misdeeds of their children, but only for the misdeeds of those who are still under their parental authority. On the other hand, if parents have children under their authority and otherwise could have restrained them, they will not be held responsible unless they also have knowledge. For that one person may be held responsible for the act of another, these two elements, knowledge and a failure to prevent, must be present.[xvii]

LS: These things come from natural equity.

Reader: "All that has been said of those in authority is with equal justice to be applied to those under authority; for these obligations spring from natural equity."[xviii]

LS: This is a clear example of what Grotius means by natural equity, *i.e.*, by natural right. These things are not arbitrarily figured out. For example, there cannot be collective guilt. It is necessary that you must have known of it and have been able to prevent it. These are not arbitrary determinations, but they follow from natural equity. They are rights according to nature. I don't believe that one can at least understand the principles of penal law without having a recourse to natural right.

In paragraph 5, near the beginning, there is a quotation from[1] [the Spartan Gylippus], the second quotation.

Reader:

> "Let these not blame their ill-fortune, or give themselves the name of suppliants,[xix] if they have fallen upon these ills through evil purpose, or if a consequence of an unjust desire for what belongs to another.[xx] For the name of suppliant is rightly due to those men whose mind is innocent[xxi]—
> "

LS: He alliterates this in his translation, "for this name is due to them *iura hominum*": "according to the right of man." I think right of man means here not the right of [a] man; it means here the right, the law, valid for man as man. But this formula—the right of men—is fundamentally the same as natural right. Paragraph 8.

Reader: "At this point the important question arises, whether punishment may be exacted always for the crime of the community.[xxii] And it seems that such punishment may be exacted as long as the community exists[xxiii]—"

[xvii] In original, not "must be present"; "should be present in like degree."
[xviii] *JBP*, 2.21.2.4.
[xix] This word is marked inaudible in the original transcript.
[xx] In original, not "or if a consequence"; "or in consequence."
[xxi] *JBP*, 2.21.5.1.
[xxii] In original, not "the community"; "a community."
[xxiii] "It seems that such punishment may be exacted so long as the community exists" is Kelsey's wording of this part of the selection.

LS: "as long as that body remains[xxiv]—"

Reader:

> although composed of changing elements, as is shown elsewhere. But on the contrary it must be remembered that in the case of a community certain things belong to it primarily and necessarily,[xxv] as a public treasury;[xxvi] while certain things belong to it only through its individual members. Thus we say that a community is wise and brave, which has a great number of wise and brave members.

LS: *I.e*., the community as such is not strictly speaking brave.

Reader:

> Into this class of things falls whatever community deserves;[xxvii] for primarily this concerns individuals, having intelligence which the community in and of itself lacks.[xxviii] When, therefore, those individuals are dead through whom the community derives its desert, the desert itself lapses also; and likewise the death of punishment which we have said cannot exist without the desert.[xxix]

LS: I suppose that is perfectly clear; it confirms only what we have said before.[2] [Desert], good or bad, can belong only to individuals, but there are of course intermediate cases, like damage owed by a community that might well go to the next generation. The subtleties of that are developed by Grotius. We cannot go into that.

Paragraph 9 and 12—perhaps you read only the heading.

Reader: "*Whether punishment may be shared without sharing the crime*

> *That, properly speaking, no one may be justly punished for another's wrong, and why*"[xxx]

LS: Yes, but that is a difficulty that appears in paragraph 14. Generally speaking, hitherto the only correct principle cannot be collective guilt. There can be guilt of a multitude, provided there is individual guilt—think of a gang of robbers—but there cannot be collective guilt proper, and paragraph 14 discusses the difficulty.

[xxiv] The phrase "*quia idem corpus manet*," rendered by Kelsey "because the same body remains," appears between the two passages read by the reader.
[xxv] In original, not "certain things belong to it"; "certain things are said to belong to it."
[xxvi] In original, not "as a public treasury"; "as a public treasury, laws, and the like."
[xxvii] In original, not "whatever community deserves"; "whatever a community deserves."
[xxviii] In original, not "having intelligence"; "as having an intelligence."
[xxix] *JBP*, 2.21.8.1.
[xxx] *JBP*, 2.21.9, 2.21.12. The reader's identification of the number of the second paragraph heading, "twelve," has been deleted.

Reader:

> It is true that in the law given to the Jews God threatens to avenge upon descendants the iniquity of the parents; but He Himself possesses the most complete right of ownership,[xxxi] over our property and over our life, and that is His, which He can take away from anyone when he pleases, for any reason and at any time. Consequently, if He carried off by a violent and untimely death the children of Achan, Saul, Jereboam and Ahab, He exercised His right of ownership over them, not of punishment, but thereby He punished their parents all the more heavily.
>
> For if the parents survive, a contingency which the divine law has in view above all else and[xxxii] (it is with this in view that the law does not extend these threats beyond great grandchildren,[xxxiii] since it is possible for men to live long enough to behold these), they are certainly punished by the sight of such a loss, and it is harder for them to bear than their own suffering[xxxiv]—

LS: This distinction here made on a theological basis is made in a different way by Hobbes in his chapter on punishment. Harm that is inflicted upon one who is a declared enemy falls not under the name of punishment, because here they were never either subject to the law and therefore cannot transgress it, or having been subject to it and professing to be no longer so, *i.e.*, being in the state of rebellion, by consequence deny they can transgress it, so they don't recognize it. All the harm that is done to them must be taken as an act of hostility, but in declared hostility, all infliction of evil is law[ful]. So in other words, Hobbes would construe these Old Testament passages as acts of hostility[3] which go unblamed, and I think he does this somewhere in the chapter on the "Kingdom of God by Nature."[xxxv] The principle of collective guilt seems to be admitted in the Old Testament; therefore [it is] against natural right.

Now we come to today's assignment, to chapter 22. Let us read the beginning of the first section.

Reader:

> We said above, when we set out to treat the causes of wars, that some were justified and others persuasive.[xxxvi] Polybius, who was the first to

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[xxxi] In the translation, the paragraph continues "both over our property and over our life, as it is His gift, which He can take away from anyone when he pleases, without any reason and at any time. Consequently, if He carried off by a violent and untimely death the children of Achan, of Saul, of Jereboam and of Ahab, He exercised His right of ownership over them, not of punishment, but thereby He punished their parents all the more heavily." In the original transcript Achan is marked inaudible.

[xxxii] In original, not "above all else and"; "above all else."

[xxxiii] The citation "Exodus 25" is inserted here in the translation.

[xxxiv] In original, not "and it is harder"; "which is harder." *JBP*, 2.21.14.1.

[xxxv] *Leviathan*, chap. 31.

[xxxvi] In original, not "were justified and others persuasive"; "were justifiable, others persuasive."

> observe this distinction, calls the former "pretexts" because they are wont to be openly alleged. (Livy sometimes applied the term "claim")[xxxvii]—

LS: Grotius has a perfectly good excuse to limit himself to the justifying causes because he is teaching law and not politics. The only thing he would say is that political men, if they want to be respected by respectable men, have to keep within the limits of the law, and within the limits there is still the possibility and the necessity of distinguishing between application and non-application. For example, you may entirely by natural law, let us say, wage war against this enemy. But still the question arises: Is it wise to do so? Or to take a famous case from Thucydides, it may be true that the inhabitants of the island of[4] [Mytilene] broke the treaty. It is then still a question whether it is wise for the Athenians to punish the[5] [populace].[xxxviii] The distinction is necessary, but what Grotius implies is that the overriding and first consideration is that of justice. The second is that of expediency.

He makes clear in the sequel in paragraph 2 that both the consideration of right and that of expediency are rational. There is also irrationality: in other words, people may attack another nation without any regard to right and without any regard to advantage, merely because they enjoy killing. They get a kick out of it, and these are of course brutish men. Let us turn to paragraph 8.

Reader: "The desire to change abode, in order that by abandoning swamps and wildernesses a more fruitful soil may be acquired, is not a just cause for war.[xxxix] Tacitus says that this was a cause of warfare among the ancient Germans."[xl]

LS: This played a great role also in the migration period. The Nordic nations conquered the Roman empire. This is not a just cause of war, merely because Gaul or Italy are more pleasant countries than Poland. We keep this in mind for a later purpose.

Paragraph 10: there is no right of those who are by nature superior to subjugate those who are by nature inferior. The right to rule,[6] this does not imply goodness or wisdom, depends on consent. Turning to a more practical level, let us read paragraph 11.

Reader: "Liberty, whether of individuals or of states, that is, or a polity[xli]—"

LS: In the literal sense of the term, the right to live under one's own laws.

Reader:

[xxxvii] In original, not "Livy sometimes applied"; "Livy sometimes employs." *JBP*, 2.22.1.1.
[xxxviii] This incident is related in Thucydides' *History*, Book III, culminating in the famous debate between Cleon and Diodotus, 3.37-49.
[xxxix] In original, not "is not"; "does not afford."
[xl] The words "swamps and wildernesses" are marked inaudible in the original transcript. *JBP*, 2.22.8.1.
[xli] In original, not "or a polity"; "'autonomy.'"

> cannot give the right to war, just as if by nature and at all times liberty was adapted for all persons.[xlii] For when liberty is said to be an attribute by nature of men and of peoples this must be understood as the law of nature which precedes all human conditions,[xliii] and of liberty "by redemption,"[xliv] not of that which is "by opposition"; that is to say, that by nature no one is a slave, but not that man never has the right to enter slavery in that sense, no one is free.[xlv]
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> Here applies the saying of Albutius: "No one is born free, no one a slave; it is after birth that fortune has imposed these distinctions upon individuals."[xlvi]

LS: Wars of liberation are as such unjust wars, for those who have been legitimately enslaved, naturally they are legitimate slaves. But this raises further questions which are not discussed here. Can legitimate slavery extend to descendants, if there is only guilt of individuals? I believe Grotius never brings that up fully.

Student: There is a question[7] [on] the part of the parent whether it is necessary to keep the child enslaved because he can't afford . . . .

LS: Oh, yes, I remember now its construction. This owner of the slaves brought these creatures up; he fed them. He may emancipate this second generation but he is not obliged to. And he may, if there is very great need, sell his own children into slavery.[xlvii] You know Grotius is not a revolutionary.

In the second sentence of this paragraph, when it is said that men are by nature free, thus must be understood by the right of nature which precedes every human act.[xlviii] Later on it would be called state of nature. Again we see that the term is avoided. Even the commentator who writes about two generations later when the term was more in use does not use it.

In[8] [paragraph] 12 it is clear that you cannot subjugate people under the pretext that they are by nature slaves. Let us read paragraph 13.

Reader:

> I can hardly trouble to add that the title which certain persons give to the Roman Emperor is absurd,[xlix] as if he had the right of ruling over even the

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[xlii] In original, not "for all persons"; "to all persons."
[xliii] In original, not "as the law of nature"; "of the law of nature."
[xliv] In original, not "'by redemption'"; "'by exemption.'"
[xlv] Kelsey translates the end of the paragraph so: "that is to say, that by nature no one is a slave, but not that man has the right never to enter slavery, for in that sense no one is free."
[xlvi] "Albutius" is marked inaudible in the original transcript. *JBP*, 2.22.11.1.
[xlvii] Grotius discussed these issues in Bk. 2, chap. 5.
[xlviii] The Latin is *jure naturae praecedente factum omne humanum.*
[xlix] In original, not "can hardly trouble"; "should hardly trouble."

> most distant and hitherto unknown peoples, were it not that Bartolus,[l] long considered first among jurists, had dared to pronounce him the heretic who dares to deny to the Emperor this title.[li] His grand pursuit is that the emperor at times calls himself lord of the world,[lii] and that in the sacred writings that empire, which later writers called Romagna, is then fated as "the inhabited world."[liii] Of like character is this expression, "now the whole earth the victorious Roman held," as are many similar expressions used in the broad sense, or in hyperbole, or in high praise.[liv]

LS: In other words, this notion which plays such a great role, not in present-day thought directly, but in present-day historical thought, about the Roman Empire or similar things, that this is strictly a universal empire or understood itself as the universal empire, is of course nonsense. We don't need Grotius for that. The clearest proof is the writing of one famous Roman himself, Cicero, in the last Book of his *Republic*, the section called the Dream of Scipio. Scipio, the great Scipio, is shown the Roman Empire: and what a tiny patch even of the earth, let alone of the universe. People speak colloquially, metaphorically, poetically, about the universality of the Roman Empire or about the eternity of the Roman Empire. This is another matter. Paragraph 16.

Reader:

> This principle, too, must be recognized. If a person owes a debt which is not an obligation from the point of view of strict justice, but arises from some other virtue, of generosity, gratitude, pity or charity, this debt cannot be collected by armed force any more than in a court of law.[lv] For either procedure it is not enough for the demand which is made ought to be met for a moral reason,[lvi] but in addition we must possess some right to enforce it.
>
> This right is at times confirmed by divine and human laws, even in the case of obligations that arise from other virtues; and when this happens there arises a new cause of indebtedness which relates to justice.[lvii]

LS: This is clear. Therefore, the same applies also to war. A moral virtue other than justice proper does not give the right to war, only justice strictly understood. Say, a motherland to a colony, and they were not grateful—that is an unjust cause of war. But there are certain difficulties, as you see in paragraph 17.

Reader:

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[l] "Bartolus" is marked inaudible in the original transcript.
[li] In original, not "who dares to deny"; "who denies."
[lii] In original, not "grand pursuit"; "ground, forsooth."
[liii] In original, not "Romagna, is then fated"; "Romania, is designated."
[liv] In original, not "the broad sense"; "a broad sense." *JBP*, 2.22.13.1.
[lv] In original, not "of generosity"; "such as generosity."
[lvi] In original, not "not enough for the demand"; "not enough that the demand."
[lvii] *JBP*, 2.22.16.1.

> With these quotations you may rightly associate the passage of Augustine: "The eager desire to injure, the cruelty of vengeance, the unappeased and unappeasable mind, the savagery of rebellion, the lust of ruling, and whatever else there is akin, these are the things which are justly censured in warfare."
>
> However, when a justifiable cause is not wanting, while these things do indeed convict as wrong the party that makes the war, yet they do not render the war itself properly speaking unlawful. Hence, no restitution is due as a result of a war undertaken under such conditions.[lviii]

LS: You see again how important is the distinction between justice strictly understood and the other virtues of what we call international law in Grotius' sense.

Student: What does he mean by restitution being due—as restitution would be due in an unjust war, but he already has said that the legal effects of an unjust war are such that restitution isn't . . . .

LS: Let us apply it to this case. A war waged because of a moral depravity of the other party is an unjust war, therefore it cannot have any lawful consequence. You can force them to pay damages, but you have no right to demand it.

Student: Is it the case that all public wars that are properly conducted have the same legal effect?

LS: But this is the question of *ius gentium*. *Ius gentium* in contradistinction to natural law simply makes it a rule to treat all formally correct wars—declaration of war by a government de facto, by a recognized government—[9] [as] a just war, but that is the fiction of *ius gentium*,[10] [not of natural law]. We come now to the doubtful cases in chapter 23.

Reader:

> What Aristotle wrote is perfectly true, that certainty is not to be found in moral questions to the same degree as in mathematical science. This comes from the fact that mathematical science completely separates forms from every matter ,[lix] and that the forms themselves are generally such that between two of them there is no intermediate form, just as there is no mean between a straight and a curved line. In moral questions, on the contrary, even trifling circumstances alter the matter,[lx] and the forms, which are the subject of inquiry, are wont to have something intermediate, which is of such scope that it approaches now more closely to this, than to that extreme.[lxi]

[lviii] *JBP*, 2.22.17.2-3.
[lix] In original, not "every matter"; "substance."
[lx] In original, not "matter"; "substance."
[lxi] In original, not "than to that extreme"; "now to that extreme."

> Thus it comes about between what should be done and what is wrong to do there is a mean, fact which is permissible; and this now goes into the former, now into the latter.[lxii]

LS: And so on. I think that is sufficiently clear. Therefore there is a certain ambiguity, there is a certain mutability. This and this action which under these circumstances is justifiable is under slightly different circumstances unjustifiable.

Now this is, I think, a matter of great importance, because the whole worth of Grotius is based, as we have seen from the Prolegomena [onward], on the premise—the whole work is devoted to the purpose of making a strict separation of natural right and all other rights, and to reduce natural right, the whole [of] natural right, to the level of an art. And the reason given is the immutability of natural right. Human rights, human laws, can from Grotius' point of view not be reduced to an art because it will be changed all the time. That would be as impossible as to have a science of stamps. You may collect stamps, but strictly speaking from the older point of view[11] [a science] is impossible because of the entirely arbitrary character of the thing. From our point of view there is of course no difficulty of finding a science of stamps, and some pursuits are perhaps not of higher intellectual interest than stamp collecting, but from the older point of view that would have been quite absurd, and for the same reason there cannot be strictly speaking a science of human law. The same applies also of divine law, but for reasons that are somewhat different as the grounds and reasons are not accessible.

But to come back to the main point: Grotius will do this novel thing, reduce natural right to an art, and the reason why he can do it is because natural right is immutable. Now that natural right is immutable is of course a traditional assertion, but it has certain qualifications which Grotius does not make. I brought the English translation for convenience sake on the section in the *Summa*, Thomas' *Summa*, first part of the second part, question 94, article 5, [on] whether the natural law can be changed. Will you read these two paragraphs?

Reader:

> I answer that, a change in the natural law may be understood in two ways. First by way of addition. In this sense, nothing hinders the natural law from being changed, since many things for the benefit of human life have been added over and above the natural law, both by the divine law and by human laws.
>
> Secondly, a change in the natural law may be understood by way of subtraction, so that what previously was according to the natural law ceases to be so. In this sense, the natural law is altogether unchangeable in its first principles, but in its secondary principles, which as we have said are certain detailed proximate conclusions drawn from the first principles, the natural law is not chained so that what it prescribes be not right in

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[lxii] The translation: "Thus it comes about that between what should be done and what it is wrong to do there is a mean, that which is permissible; and this is now closer to the former, now to the latter." *JBP*, 2.23.1.1.

> most cases.[lxiii] But it may be changed in some particular cases of rare occurrence, to some special causes hindering the observance of such precepts, as was stated above.[lxiv]

LS: Simply stated, according to Thomas Aquinas, the highest principles of natural law are unchangeable. The conclusions, and the more we go down into specific situations, the more it will be changeable, and that is the reason why a system, an art, is not possible, because you cannot possibly know all of the circumstances which may arise.

This is the reason, I believe, why these codes of natural law were made only from the seventeenth century on, because the immutability was now literally understood and not in the way in which Thomas Aquinas meant it. Whether the Thomistic view regarding the unchangeability of natural right is identical with Aristotle's view is quite important, and in a way [there] is a reference to Aristotle here[12] [that] points in the right direction, that from Aristotle's point of view there cannot be an unchangeable natural right.[lxv] He takes it up on a later occasion and we get clearer passages.

Now paragraph 6 in this same chapter.

Reader:

> Now war is of the utmost importance, seeing that in the consequence of war a great many sufferings usually fall on innocent persons.[lxvi] Therefore, in the midst of divergent opinion we must lean towards peace. Silius Italicus praises Fabius, for[lxvii]—
>
> > With cautious mind the future did he stand,
> > Nor took the light
> > To stir up causes for war that Were
> > Slight and doubtful.[lxviii]

LS: So that is the principle. There are cases[13] [where] you can[not] say whether it is right or wrong to wage war. In that case, no war, because of the terrible miseries which[14] [would be inflicted]. Whether that can be maintained in practice in this way because of the[15] [practical circumstances] is another matter. Let us see in paragraph 10.

Reader: "Something akin to the lot—"

[lxiii] In original, not "is not chained"; "is not changed."
[lxiv] In original, not "to some special causes"; "through some special causes."
[lxv] Aristotle's classic statement that fire burns the same here and in Persia, but justice is variable, is in *Nicomachean Ethics* V.7.
[lxvi] In original, not "fall on innocent persons"; "fall upon even innocent persons."
[lxvii] "Silius Italicus" and "Fabius" are marked inaudible in the original transcript.
[lxviii] Silius' verse appears so at 2.23.6.1:

> With cautious mind the future did he scan,
> Nor took delight
> To stir up war for causes
> Slight and doubtful.

LS: The lot is one way in which you can avoid war; if there is some controversy between two nations and it cannot be left open and must be settled now, one way to do it is tossing coins—better than war.

Reader:[lxix]

> single combat. Resort to single combat if two persons, whose disputes would otherwise afflict both peoples with very serious evils, are ready to settle their disputes by arms, and in olden times Hyllus and Echemus for the Peloponnesus, Hyperochus and Phemius for the country adjacent to the Inachus, Pyraechma an Aetollian and Demenus the Epean for Elis, and Corbis and Orsua for Iba. In fact it seems clear that, if the combatants themselves should not act aright, this decision might be accepted by their states for some lesser evil.

LS: So there is a question whether this single combat is in itself an unjust action, but still it is undeniably a lesser evil that one fellow is killed than thousands or more by a war, so there are some reasonable limits to Grotius'[16] [insistence on justice]. Paragraph 13.

Reader:

> In the particular sense and with reference to the thing itself, a war cannot be just on both sides, just as a legal claim cannot. The reason is that by the very nature of the case, a moral quality cannot be given to opposites such as doing and restraining.[lxx]

LS: It is clear. If my taking this back is just, then anyone preventing me from taking this step is therefore unjust. Otherwise the principle of contradiction breaks down. Therefore Grotius maintains that there cannot be a war just on both sides.

Reader:

> Yet it may actually happen that neither one of the warring parties does wrong. No one acts unjustly without knowing that he is doing an unjust thing, but in this respect many are ignorant. Thus either party may justly, that means in good faith, plead its case. For both in law and in fact anything out of which a right arises ordinarily escape the notice of men.[lxxi]

[lxix] The translation of the selection reads: "Something akin to the lot, furthermore, is single combat. Resort to single combat it does not seem necessary altogether to reject 'if two persons, whose disputes would otherwise afflict whole peoples with very serious evils,' are ready to settle their dispute by arms, as in olden times Hyllus and Echemus for the Peloponnesus, Hyperochus and Phemius for the country adjacent to the Inachus, Pyraechma an Aetollian and Degmenus the Epean for Elis, and Corbis and Orsua for Iba. In fact it seems clear that, if the combatants should themselves not act aright, assuredly the decision might be accepted by their states as the lesser evil." Marked inaudible in the original transcript are the words "Hyllus and Echemus for the Peloponnesus, Hyperochus and Phemius for the country adjacent to the Inachus, Pyraechma an Aetollian and Degmenus the Epean for Elis, and Corbis and Orsua for Iba." *JBP*, 2.23.10.1.

[lxx] In original, not "such as doing and restraining"; "as to doing and restraining."

[lxxi] In original, not "in fact anything"; "in fact many things." *JBP*, 2.23.13.2.

LS: So this is one of the key passages for you. Now what does this mean? A war cannot be just on both sides, but a man may be unable to know which side is just. Let us take a very crude case of an attack merely for the sake of devastating the other's territory. We would say that was unjust, especially if the one party never did that to the first party. That is simple, but ordinarily the cases are more complicated, and then it may be so that it is simply impossible for a fair and impartial man to decide who is wrong, so that the principle remains but becomes inapplicable.

Student: Is this one of the reasons[17] [Grotius replaces "just war" with "legal war"]?

LS: Sure. This was of course a very commonsensical reason, but it is not sufficient. I think the clearest theoretical formulation is that states are in a state of nature toward each other, and there is no superior judge, there is no competent judge. The practical reasons against the use of the concept of the just war are of course very great, but we have seen in our lifetime that there are cases where it is very clear. I mean it is not a hundred percent clear—for example, Germany had some very just grievances: think of the war guilt and especially since the things inflicted on Germany at Versailles were based on the war guilt, and therefore that was of course objectionable.

If we take another point which is not even recognized by international law but which has at least a show of justice, what they call *Lebensraum*, living space. We must export [some of our people] or die. But let us assume that because of a protective policy of other countries, you can't export [people] and your population is reduced to starvation, what about that? Assuming that these protectionist laws have not been made in order to hurt the[18] [nation with excess population], but just for the self-interest of the people concerned. Now this is the point to which I am leading up.

Grotius does not consider the critical case here, I believe. That is the difference between him and the other party, and let us take as the clearest example that terrible fellow from Florence, Machiavelli. I ask you to read Machiavelli's *Discourses*, book 2, chapter 8. He speaks of two kinds of war: wars undertaken for the sake of glory, which would be the unjust cause; and wars undertaken for the sake of necessity, the alternative being starvation. And this is of course his[19] [statement of the alternatives], and there is the paradoxical fact that the unjust war undertaken for the sake of glory is much more humane than the just war. This is of course an important question, and this is naturally underlying the living[20] [space (*Lebensraum*)] problem. If a nation for some reason or other is reduced to a situation of starvation, and of course the other nations are naturally not willing (you must not think of the present-day situation where some nations may have an enormous surplus and can just give this [nation] aid), but what can be done in this case?

This is the equivalent in international law to the two men in the raft, two shipwrecked men. One cannot possibly say that the one who pushes the other into the sea commits murder. Hobbes, who is much more in favor of justice than some people think, has given this discussion which is mild. In chapter 30 of the *Leviathan*, with the heading

"Prevention of[21] [Idleness]," in other words, public charity, but prevention of[22] idleness.[lxxii]

> But for such that have strong bodies, the case is otherwise [**LS**: in other words] they are to reverse the work and to avoid the excuse of not finding employment, there ought to be such laws to encourage all men manner of arts; as navigation, agriculture, fishing, and all manner of manufacture that requires labor.[lxxiii] The multitude of poor and yet strong people still increasing, they are to be transported into countries not sufficiently inhabited[lxxiv][**LS**: in Hobbes's time, of course, into his Majesty's North American plantations] where nevertheless they are not to exterminate those they find there[23] [**LS**: Machiavelli says it doesn't make any difference] but constrain them to inhabit closer together,[lxxv] and not to range a great deal of ground, to snatch what they find;[lxxvi] but to court each little plot with art and labor, to give them sustenance in due season.[lxxvii]

Parts of this country which are empty—why not get in some fifty million Indians? It will come, I believe, but it has not yet reached the state of[24] [overpopulation]. At any rate, "when all the world is overfull of inhabitants, then the last remedy of all is war; which provides for every man, victory, or death."[lxxviii]

So in the last analysis of course, Machiavelli's point comes out. I believe Hobbes still has the important qualification that in many cases, even in the dark ages, Germanic tribes came down—

[change of tape]

LS: Read the beginning of paragraph 4.

Reader:

> Often indeed we find an obligation resting on ourselves and ours to prevent recourse to arms. Plutarch in his *Life of Numa*, says that, after the Fetiales had declared that war could be justly undertaken, the senate debate is whether it would be advantageous[lxxix]—

[lxxii] Strauss now reads a passage from chapter 30 of *Leviathan*, inserting parenthetical comments of his own.

[lxxiii] Hobbes has "they are to be forced to work and to avoid the excuse of not finding employment, there ought to be such laws as may encourage all manner of arts; as navigation, agriculture, fishing, and all manner of manufacture that requires labor." Marked inaudible in the original transcript are the words "manner of arts; as navigation, agriculture."

[lxxiv] In original, not "transported"; "transplanted."

[lxxv] In original, not "but constrain them"; "but to constrain them."

[lxxvi] In original, not "to snatch"; "or to snatch."

[lxxvii] Marked inaudible in the original transcript are the words "but to court each little plot with art and labor, to give them sustenance in due season."

[lxxviii] Hobbes writes "when all the world is overcharged with inhabitants, then the last remedy of all is war; which provides for every man, by victory, or death."

[lxxix] Kelsey has "Often indeed we find an obligation resting on ourselves and ours to prevent a recourse to arms. Plutarch, in his *Life of Numa*, says that, 'after the Fetiales had declared that war

LS: That is clear.

Reader:

> In one of Christ's parables, it is said that if a king has to strive in war with another king,[lxxx] they will first sit down,[lxxxi] as is the custom with those who take counsel seriously, and will weigh within himself whether he who has ten thousand soldiers can be a match for an enemy who has twice that number. If he sees that he will not be a match for his adversary before a foe comes within his borders, he will send an embassy with instructions to arrange a peace.[lxxxii]

LS: What about the case in which it is a moral duty and not merely permitted to wage war? Or is there never such a case? Is this not an implication of Grotius' teaching regarding international law that there can never be a duty to wage war? There cannot be, because there may be an alliance, a treaty.

Student: But also in the analogy of the man, by nature he is required to preserve himself.

LS: But there is a difference here, the difference between natural bodies and artificial bodies. There is no simple analogy.

Student: But doesn't he say that in the case of a just war, an ally isn't bound to come to the aid of another ally if the cause is hopeless?

LS: I think so, but this of course creates another difficulty. What about the sanctity of treaties? Then you come back to this principle which has always been regarded as most immoral by friends of international law, that all treaties are valid, *rebus sic stantibus* (as long as things are as they are now). So when the[25] [treaty obligation] arises, you are still the judge. You know what Italy did in 1915—it had shared the alliance with Germany and it was reasonably clear, and Italy said[26] [we] will[27] [review] the situation, and it is always possible for a government which has good lawyers to find a loophole.

Student: But doesn't he say it is only a question when the cause is already lost. So there would at least be a middle ground, in which case you are bound to help your friend.

LS: This is another point. What is true of elections is also true of wars. You never can determine in advance how they will come out: it depends very much on the effort of the voting party which will come out, and this is a point which Bismarck makes occasionally. He had a long experience in this matter. Every treaty, however clearly specified, can

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could justly be undertaken, the senate debated whether it would be advantageous to undertake the war.'" The words "*Life of Numa*" and "Fetiales had" are marked inaudible in the original transcript.

[lxxx] The words "to strive in" are marked inaudible in the original transcript.

[lxxxi] In original, not "they"; "he."

[lxxxii] The parable is from Luke 14:31. *JBP*, 2.24.4.1.

never give you guarantee with what fervor your ally will wage the war. You know, they may declare war and go through the other formalities and send some divisions, but they are very lukewarm in their enterprise. Well, they[28] [honored] their treaty, and what can you do.

Let us read paragraph 6.

Reader:

> Let us draw an illustration for the question which, as Capitus relates, was once debated by the Gallic states: "Whether to desire freedom or peace."[lxxxiii]
>
> By freedom, understand civil liberty, that is, the right of the state to be governed by itself.

LS: *I.e.*, in contradistinction to personal liberty which means that one is not a slave. Civil liberties means here having one's own government, participating in government, and personal liberty means that one is not a slave. You can own property and so on.

Reader:

> This right is complete in a democratic state, and limited in an aristocratic state; it is especially complete in a state where no citizen is excluded from office.
>
> By peace, again, understand such a peace as will obviate a war of annihilation, that is, as Cicero somewhere says in explaining this problem in the Greek tongue: "If the city should be likely for this cause to endanger the lives of all."[lxxxiv] An example is where a correct forecast of the future seems to offer almost no alternative[lxxxv] than the destruction of the whole people.[lxxxvi] Such was the condition of the people of Jerusalem when besieged by Titus. Everybody knows of what Cato who preferred to die rather than obey a sole ruler, would have said in this case. Here also applies the lines: [lxxxvii]
>
> How easy is the virtuous act
> By one's own hand to free from slavery;[lxxxviii]
>
> There are many other things of this sort.[lxxxix]

LS: In other words, rather dead than red. But now the argument against that.

[lxxxiii] In the translation: "Let us draw an illustration from the question which, as Tacitus relates, was once debated by the Gallic states: 'Whether they desired freedom or peace.'"
[lxxxiv] Cicero, *Letters to Atticus* 9.4.
[lxxxv] In original, not "to offer"; "to augur."
[lxxxvi] In original, not "than the destruction"; "but the destruction."
[lxxxvii] In original, not "of what Cato"; "what Cato." Marked inaudible in the original transcript are "Titus," "what Cato," and "obey a sole ruler, would have said in this case."
[lxxxviii] In original, not "free"; "flee."
[lxxxix] "And many other things of this sort." *JBP*, 2.24.6.1.

Reader:

> But right reason teaches otherwise. Life, to be sure, which affords a basis for all temporal and occasion for eternal blessings, is of greater value than liberty.[xc] This holds true whether you consider each aspect of the case of an individual or of a whole people.[xci] And so God Himself reckons it his benefit that He does not destroy men but casts them into slavery.[xcii] And again, through the Prophet He advises the Jews to yield themselves as slaves to the Babylonians that they may not perish of hunger and disease.[xciii] Wherefore, although praised by the ancients,
>
> 'The ills Saguntum hath, by punic Soldiery besieged,'[xciv]
>
> should not be approved, nor the considerations leading thereto.[xcv]

LS: But you see that all this is true now of civil liberty, not of personal liberty. In the case of enslavement proper, meaning separations from their families and their children, would Grotius say the same thing? Because the Babylonian servitude does not of course mean personal servitude. That is the question. Peace is to be[29] [preferred to] political freedom, not to personal freedom. Let us read on in this paragraph because that is very important.

Reader:

> The slaughter of a people in a case of this kind ought to be considered as the greatest possible evil. Cicero in the second book *On Invention* gives an example of necessity. He says that it was necessary for the people of Casilinum to surrender to Hannibal,[xcvi] although this necessity had this qualification, "unless they preferred to perish by famine."[xcvii]

LS: And now the last section of this paragraph.

Reader:

> What I have said regarding liberty I wish to apply also to other desirable things, if the expectation of a greater evil for the opposite side is warranted in a greater, or even in an equal, degree.[xcviii] As Aristides rightly says, it is the custom to save the ship by casting out the cargo, and not the passengers.[xcix]

[xc] The words "all temporal" are marked inaudible in the original transcript.
[xci] In original, not "of the case"; "in the case."
[xcii] In original, not "reckons it his benefit"; "reckons it as a benefit."
[xciii] Jeremiah 27:13.
[xciv] These words are marked inaudible in the original transcript.
[xcv] *JBP*, 2.24.6.2.
[xcvi] "Casilinum" is marked inaudible in the original transcript.
[xcvii] In original, not "this necessity"; "the necessity." *JBP*, 2.24.6.3.
[xcviii] In original, not "for the opposite"; "from the opposite."
[xcix] The translation: "As Aristides rightly said, it is the custom to save the ship by casting out the cargo, not the passengers." *JBP*, 2.24.6.5.

LS: Good—and what was your criticism of Grotius, Mr. ___?[c]

Student: Paragraph 5, in putting life and self-preservation as necessary conditions—

LS: Necessary condition.

Student: Repetitiously replacing that as the end of the thing which could be accomplished.

LS: I see your point now, but let us read paragraph 8.

Reader:

> Therefore a cause for engaging in war which either may not be passed over, or ought not to be, is exceptional; as for example when, as Flora says, rights are more cruel than arms.[ci] Senecus says: "It is right to rough into dangers if we fear like evils if we remain quiet." This idea is expressed by Aristides in the following way: "They must one choose to take the pact of danger, even if the future is unknown, whenever it is evidently worse to follow the peaceful course."[cii]
>
> "A miserable peace is well exchanged for war," says Tacitus, certainly when, he says,[ciii] "either liberty will follow those who dare, or if conquered, their condition will be the same"; or "when," as Livy says,[civ] "peace is more burdensome to those who are its servitude than war to free men."[cv] The last statement does not hold if the outcome appears to be such that, as Cicero has it, if you are beaten you will be proscribed; and if you gain the victory you will still be a slave.[cvi]

LS: So that is some qualification, isn't it? Some qualification . . . .

Student: What about that "ought" in the question of whether there should be certain kinds . . . .

LS: I believe the clearest case would be a treaty of declaration.[cvii] Now there is a difficulty here regarding punitive war in paragraph 7.

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[c] This presumably refers to a student paper that was delivered at the beginning of the class, and not recorded.

[ci] "Florus," not "Flora."

[cii] Kelsey: "Seneca says: 'It is right to rush into dangers when we fear like evils if we remain quiet.' This idea is expressed by Aristides in the following way: 'Then must one choose to take the path of danger, even if the future is unknown, whenever it is evidently worse to follow the peaceful course.'" The words "one choose" are marked inaudible in the original transcript.

[ciii] In original, not "he says"; "as he says."

[civ] In original, not "says"; "declares."

[cv] In original, not "are its servitude"; "are in servitude."

[cvi] *JBP*, 2.24.8.1.

[cvii] Apparently a treaty committing a state to war.

Reader: "In exacting penalties, moreover, this must be observed particularly, that war is not to be waged on such a pretext against him whose forces unequal to our own.[cviii] For, as in the case of a civil judge, he who wishes to avenge crimes by armed force ought to be much more powerful than the other party."[cix]

LS: This shows the link between the right and expediency. There is of course a point where the Machiavellian argument comes in. If you want to have justice, you must first make yourself strong enough in order to judge and exact judgments. This precedes the just action, and then by a natural turn of the argument, how do you become strong in the first place? Now I tried to present this in the form of a[30] [diagram]. [LS writes on the blackboard] Here is virtue—no, I'm sorry, here is happiness. Here is virtue, plus equipment, in Aristotle's formula. Now the man begins. He has neither virtue nor equipment. What shall he do, say to himself: Let me first get the equipment and virtue afterwards? Or vice versa? Something of this sophism is of course very easily possible, especially between political men, and that is of course Machiavelli's point. Before you can have justice, you must have power, the security. You must make justice secure, safe, and this of course without any holds barred. Later, when once you are strong, it is your duty to be just. And that is in a way also true of the Hobbean doctrine.

Student: In view of the context of exacting penalties, I wonder whether one couldn't say that in giving a prudential observation in line with Aristotle, that you don't exact penalties unless you are strong enough, but that wouldn't mean you aren't just.

LS: Very well. He then would be led to the question: Is there ever an obligation to wage war? The clear case[31] [would involve] a treaty. This would lead very well into a penal war, punitive war, because your ally may have been unjust entirely. This might be the simple connection.

Surely Grotius is a very humane man and if he had his way, there would be no wars. This leads up to the broader question which came to the fore much later, though it was implied from the very beginning, namely, what about a state of complete absence of war? Perpetual peace, as Kant calls it. William James wrote an essay on the moral substitute for war because, assuming that war has some good sides, which of course Grotius simply denies, then the question must be raised.[cx] Of course, one can say that the premise of the book is that war is co-eval with the human race.

Let us turn to chapter 25 at the beginning.

[cviii] In original, not "whose forces unequal"; "whose forces are equal." The words "him whose" are marked inaudible in the original manuscript.

[cix] "For, as in the case of a civil judge" are marked inaudible words in the original transcript. *JBP*, 2.24.7.1.

[cx] Immanuel Kant, "To Perpetual Peace: A Philosophical Sketch," in *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis: Hackett, 1983), 107-44; William James, "The Moral Equivalent of War" in *Writings 1902-1910* (New York: Library of America, 1987), 1281-93.

Reader: "In the earlier part of this work, when we dealt with those who wage war, we asserted and showed that by the law of nature each individual was justified in enforcing not merely his own right but also that of another."

LS: You remember the difficulty and the transition from "everyone" to "every good man."

Reader: "The causes, therefore, which are just in relation to the person whose interest is at stake are just also in relation to those who give assistance to others."[cxi]

LS: But this is of course only a "may." Anybody may execute another right; there is no duty to do so.

Here there are all kinds of interesting questions in paragraph 3. Can a state legitimately hand over an innocent citizen to an enemy state who demands this extradition? The Spanish writers, Vasquez and De Soto, say no, but Soto says that the citizen is obliged himself to surrender to that enemy in order to save the trouble to his country.[cxii] In other words, it is a matter of charity, not of right. Grotius denies that there is such a duty strictly understood. This is one of the points which he discusses. Let us turn to paragraph 3, section 4.

Reader:

> But on the supposition that a citizen demanded by the enemy has to surrender himself to them there remains a question whether he may be compelled to do that to which he is morally bound.[cxiii] Soto declares that he cannot,[cxiv] and by way of illustration cites the case of the rich man who by the precepts of mercy is bound to give alms to the poor man, but he nevertheless cannot be forced to do so.[cxv] We must observe, however, that the relation of parts among themselves is one thing, and that of superiors when they are contrasted with those subject to them is quite another. For an equal cannot be compelled by an equal, except to perform what is owed in accordance with a right properly so called. But a superior can compel an inferior to do other things also, which some virtue demands, because this is embraced in the proper right of the superior as such. Thus, during a grain famine, citizens may be compelled to contribute what they have to common store.[cxvi]
>
> Hence in this argument of ours it seems even more true that a citizen may be constrained to do that which regard for others requires.[cxvii]

[cxi] *JBP*, 2.25.1.1.
[cxii] Gabriel Vásquez (c. 1550-1604); Domingo de Soto (1494-1560).
[cxiii] In original, not "the enemy has to surrender himself to them there remains a question"; "the enemy ought to surrender himself to them there remains the question."
[cxiv] "Soto declares that he cannot" are marked inaudible words in the original transcript.
[cxv] In original, not "but he nevertheless"; "but who nevertheless."
[cxvi] The word "famine" is marked inaudible in the original transcript.
[cxvii] *JBP*, 2.25.3.4.

LS: "Charity" we can say, translated. Here is the question again of the difference of duties which can be enforced and duties which cannot be enforced. This distinction is not simply identical with the distinction between morality and law as it later came to be understood. This is proven by the fact that the government, the sovereign, may make duties deriving from other virtues, as is distinct from right strictly understood. Grotius is here, one can say, between Aristotle and Locke. For Aristotle there is no question that it is the duty of the city to make the citizen good and not to merely make them keep their contracts, etc. Because the *polis*, the city, is for the sake of virtue. The opposite pole is Locke: the *polis* is only for the protection of comfortable self-preservation and nothing else is of any concern. Grotius says the ruler may demand more of the subjects than justice narrowly and strictly understood. He could well have another [reason for this] position, [namely],[32] "how else could some of the requirements of Christian morality become legal requirements?" Think only of monogamy, which according to Grotius is not prescription of natural right, and yet he takes it for granted that one may legitimately establish[33] monogamy.

This leads of course to all kinds of other questions which are of immediate relevance today. Let us take a frequently discussed thing: the prohibition of pornography. This in itself has nothing to do with mine and thine narrowly understood, but has to do with the concern for the virtue of the citizen, especially of the younger generation. Therefore also the objection raised by the people who fundamentally follow Locke who simply say: Comfortable self-preservation, okay, but no concern with virtue. Is this not clearly the dividing line between the Aristotelians and the Lockeans up to the present day?

Or take the case of homosexuality. On the Lockean side, there is not the slightest right to prohibit that, whereas it follows so easily from the Aristotelian basis. I suppose the moderate people, the in-between people, would say: Well, we are not concerned so much with virtue proper but with certain generally accepted notions of decency. I believe even the ADA will have no objections that nudists may be prevented by police officers from walking[34] [around nude].[cxviii] I believe there are certain notions of decency prevailing in the community and they as such can be protected by law. But still if the mores change thirty years from now, this may be entirely different. It has no intrinsic ground, except for the time being it is the prejudice of the American people.

Student: What about the[35] [argument] of [public] safety in respect to pornography or crime?

LS: Crimes are a different story. It all depends. If you are so enamored of an extremely strict interpretation or an extreme interpretation of the First Amendment,[36] [you would] say any interference with any speech, oral or written, is[37] [illegitimate]. But if you take the older, simpler view that the government is there in the first place for the protection of life, liberty, and property of every individual and that's all, this could perfectly be compatible with forbidding the teaching that theft, forgery of checks, and other things are

[cxviii] Presumably "ADA" here is Americans for Democratic Action, a politically liberal organization founded in 1947.

perfectly all right. There is no objection to that, of course, but there would be objections to prohibitions against polygamy, homosexuality and pornography because these do not fall within this sphere of comfortable self-preservation strictly understood. I think the present liberal position is complicated. It is not simply of Lockean origin, but has an injection of probably Rousseau and Kant in origin—the ultimate freedom of the individual, not primarily concerned with self-preservation.

In paragraph 4 he speaks about how far does the duty to assist allies extend, only of course if the allies engage in a just war, but only if there is hope for a happy issue, and this is a matter of some clarity. Let us turn to paragraph 8 here.

Reader:

> If, however, the wrong is obvious, in case some Busiris, Phalaris, or Thracian Diomede should to inflict upon his subjects such treatment that no one is warranted in inflicting,[cxix] the exercise of the right vested in human society does not precluded.[cxx]

LS: Let us translate "the right of human society."[cxxi] I believe what he means is right deriving from the fact that all men have a natural kinship. So in other words, one may take up arms in favor of the subjects of another government.

Reader:

> In conformity with this principle, Constantine took up arms against Maxentius and Licinius, and other Roman emperors either took up arms against the Persians, who were threatened to do so,[cxxii] unless these have checked their persecution with the Christians on account of religion.[cxxiii]
>
> If, further, it should be granted that even in extreme need subjects cannot justifiably take up arms, (and this point we have seen with those very persons whose purpose to defend the royal power are in doubt),[cxxiv] nevertheless it will not follow that others may take up arms on their behalf.[cxxv]

LS: There are a few passages in chapter 26 which are of some interest, but let us read the beginning of chapter 26.

Reader:

[cxix] In original, not "should to inflict upon"; "should inflict upon." Marked inaudible in the original transcript are the words "in case some Busiris, Phalaris, or Thracian Diomede should."
[cxx] In original, not "does not precluded"; "is not precluded." *JBP*, 2.25.8.2.
[cxxi] The Latin is *ius humanae societatis*.
[cxxii] In original, not "who were threatened"; "or threatened."
[cxxiii] In original, not "with the Christians"; "of the Christians."
[cxxiv] Inside the parentheses Kelsey translates "(on this point we have seen that those very persons whose purpose was to defend the royal power are in doubt)."
[cxxv] "Constantine" and "Maxentius and Licinius" are marked inaudible in the original transcript. *JBP*, 2.25.8.2-3.

> We have dealt with those who are independent of any control. There are others in a condition which requires them to render obedience, as sons in a household, slaves, subjects, and also individual citizens considered in relation to the body politic of their state.[cxxvi]
>
> If those under the rule of another are admitted to a deliberation, or there is given to them a free choice of going to war or remaining at peace, they will be governed by the same rules of those who at their own discretion take up arms for themselves or on behalf of others.[cxxvii]
>
> If those under the rule of another are ordered to take to the field, and that often occurs,[cxxviii] they should altogether refrain from so doing when it is clear to them that the cause of the war is unjust.[cxxix]

LS: In other words, the responsibility rests with every individual. In paragraph 4 he speaks about the same [thing] from a slightly different point of view.

Reader:

> Now if one who is under the rule of another is in doubt of whether a thing is permissible or not, he can remain inactive or obey. Very many think that he should obey; and further that he is not hindered by the famous maxim, "What you question, do not do," because who doubts as a matter of reflection does not doubt in decision involving action, for he can believe that in the matter of doubt, he must obey his superior.[cxxx]
>
> It cannot in truth be denied that this distinction of a double judgment applies in many actions. The civil law, not only of Rome but of other nations as well, under such circumstances not only grants immunity to those who obey, but also refuses to admit a civil action against them.[cxxxi]

LS: This alters the situation a bit. The general principle is, after all, [that] to judge the justice or injustice of a war, you have to know many things which simple subjects are not likely to know.

In the same paragraph, section 3 at the end. For our purposes it is sufficient to read the headings now.

Reader:

> *What they who are under the rule of another, and are ordered to go to war, should do if they are in doubt*

[cxxvi] In original, not "and also individual citizens"; "also individual citizens." *JBP*, 2.26.1.1.
[cxxvii] *JBP*, 2.26.2.1.
[cxxviii] In original, not "and that"; "as often occurs."
[cxxix] In original, not "when it is clear"; "if it is clear." *JBP*, 2.26.3.1.
[cxxx] The translation: "because he who doubts as a matter of reflection does not doubt in a decision involving action, for he can believe that in a matter of doubt, he must obey his superior."
[cxxxi] In original, not "civil law"; "municipal law." *JBP*, 2.26.4.1.

> *Sense of duty requires that subjects who doubt in regard to the justice of a war should be spared, but an extraordinary pact should be imposed upon them*[cxxxii]

LS: It is clear, because after all a great many things have been done to the just enemy, and for this kind of collective responsibility, of course [there is] not collective guilt.

Reader: "*When it may be just for subjects to bear arms in a war that is unjust*"[cxxxiii]

LS: That is a fundamental principle, if they really are unable to judge or have no choice. He repeats here in effect again that there cannot be a war just on both sides, strictly speaking, there can only be an ignorance. If there is an ignorance in regard to justice, that's another matter. Perhaps in paragraph 4, section 4.

Reader:

> This view, however, is not free from inherent difficulties. Our countryman, Adrian, who was the last Pope of Rome north of the Alps, supports the contrary,[cxxxiv] and this may be established, not exactly by the reasons which he deduces,[cxxxv] but by the more pregnant one that whoever hesitates,[cxxxvi] when reflecting, in his decision to act ought to choose the safer course. The safer course, however, is to refrain from war. The Essenes are praised because it is war among other things "not to injure anyone even if ordered to";[cxxxvii] also their imitators the Pythagoreans,[cxxxviii] who, in testimony of Iamblichus, refrained from war, giving as their reason that "war organizes and ordains slaughter."[cxxxix]

LS: Then we would come back ultimately to the great question whether war can ever be justified, and which Grotius, as we have seen, answers in the affirmative. But this would lead us beyond the limits of what we can fruitfully discuss in this course. I think we must find our way back to the principle involved and the simple distinction, and the one which has to do with Machiavelli: Are there not situations in which one cannot possibly say which side is just? Are there not situations in which a war is objectively just on both sides? This would not do away with the distinction between unjust and just wars, but it would imply a serious qualification, a theoretically more serious qualification than the

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[cxxxii] Here is Kelsey's translation of the title of the fifth paragraph of Book 2, chapter 26: "*Sense of duty requires that subjects who doubt in regard to the justness of a war should be spared, but the burden of an extraordinary tax may be imposed upon them*". *JBP*, 2.26.4, 2.26.5.

[cxxxiii] *JBP*, 2.26.6.

[cxxxiv] In original, not "the contrary"; "the contrary opinion."

[cxxxv] In original, not "deduces"; "adduces."

[cxxxvi] In original, not "pregnant one"; "pressing one."

[cxxxvii] In original, not "it is war"; "they swore" in the translation. "The Essenes are praised" is marked inaudible in the original transcript.

[cxxxviii] The translation has "also their imitators the Pythagoreans." The original transcript has "although [inaudible] of the Pythagoreans."

[cxxxix] In original, not "in testimony"; "on the testimony." The name "Iamblichus" is marked inaudible in the original transcript. *JBP*, 2.26.4.4.

one caused by the fact emphasized by Grotius that there are quite a few cases in which it is impossible to know, especially for the subject, which belligerent is just.

But we must also not forget—and I enumerate this now as another point which we must keep in mind—this whole question of natural right as Grotius understands it and its relation to the other kinds of right. This will come to the fore in the third book, because at the beginning of the third book Grotius takes up what the *ius gentium* says about how to wage war, and the *ius gentium* is extremely liberal: you may kill, burn down, rape, and I don't know what, without any difficulty whatever. And of course this is clearly against natural right.

Then the question arises: What is the relation between *ius gentium*, *i.e.*, right of human origin, and natural right? That natural right is supplemented by human right, this is no difficulty. In other words, that human right may forbid certain things that natural right permits. Natural right permits polygamy; human right says no: monogamy. That's all right, but if the opposite is true, if the human right permits things which natural right forbids, this shows a very great weakness in the very notion of natural right, and if natural right forbids the killing of people known to be innocent and the *ius gentium* says: No, you do not commit a punishable offense; in sacking a town you do what you like. That is a great question, and we must take this up. There will be a few passages at least in book 3 where he will take up the question explicitly.

For an understanding of the fundamental issue here, the most helpful document which occurs to me immediately is the Fifth Book of the *Republic*, the section on the waging of war, shortly before the passage comes up[38] [about] the philosophers are kings and kings are philosophers. Before that, say five or six pages before—he discusses how to wage war. I believe you will be better prepared for the next meeting if you read these five or six pages.[cxl]

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[1] Deleted "[inaudible]."
[2] Deleted "[inaudible]."
[3] Deleted "for."
[4] Deleted "[inaudible]."
[5] Deleted "monarch."
[6] Deleted "and."
[7] Deleted "upon."
[8] Deleted "chapter."
[9] Deleted "is."
[10] Deleted "[inaudible]."
[11] Deleted "that."
[12] Deleted "and."
[13] Deleted "whether."
[14] Deleted "were rendered."
[15] Deleted "[inaudible]."
[16] Deleted "[inaudible]."
[17] Deleted "[inaudible]…."
[18] Deleted "[inaudible]."
[19] Deleted "[inaudible]."

[cxl] See Plato, *Republic* 466d-471b.

[20] Deleted “state’s.”
[21] Deleted “violence.”
[22] Deleted “violence.”
[23] Deleted “as.”
[24] Deleted “publication.”
[25] Deleted “[inaudible].”
[26] Deleted “I.”
[27] Deleted “see.”
[28] Deleted “[inaudible].”
[29] Deleted “referred to as.”
[30] Deleted “[inaudible].”
[31] Deleted “of.”
[32] Deleted “which goes.”
[33] Deleted “a.”
[34] Deleted “in their nudism.”
[35] Deleted “origin.”
[36] Deleted “and.”
[37] Deleted “involved.”
[38] Deleted “if.”

Session 11: November 10, 1964

Leo Strauss: Now we turn to our third book and perhaps we will have a look at the Prolegomena, paragraph 33 or thereabouts, where he speaks about the contents of books 2 and 3.[i]

Reader:

> The second book, having for its object to set forth all the causes from which war can arise, undertakes to explain fully what things are held in common, what may be owned in several; what rights persons have over persons, what obligation arises from ownership; what is the rule governing royal successions; what right is established by a pact or a contract; what is the force of treaties of alliance; what of an oath private or public, and how it is necessary to interpret these; what is due in reparation for damage done; and what inviolability of ambassadors consists;[ii] what law controls the burial of the dead, and what is the nature of punishments.
>
> The third book has for its subjects, first, what is permissible in war. Having distinguished that which is done with impunity, or even that which among foreign peoples is defended as lawful, from that which actually is free from fault, it proceeds to the different kinds of peace, and all compacts relating to war.[iii]

LS: I think it is clear from this distinction that there must be a lot of overlapping. Think only of legations and burials and what may have or may not have to do with wars. Well, Grotius had to divide the subject matter somehow, and whether he succeeded is another question. But for a broader understanding, we need only repeat what was described before, namely, look at the passages in[1] the[2] Fifth Book of Plato's *Republic*.[iv] We cannot read the whole unfortunately, but only a few passages.

Reader:

> *Soc*: Will they not regard any difference with Greeks who are their own people as a form of faction and refuse even to speak of it as war?
>
> *Glaucon*: Most certainly.
>
> *Soc*: And they will conduct their quarrels always looking toward a reconciliation?[v]
>
> *Gl*.: By all means.

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[i] The original transcriber notes that the session began with the reading of a student's paper. The reading, and evidently the discussion following as well, was not recorded.

[ii] In original, not "and what inviolability"; "in what the violability."

[iii] Prolegomena, 34-35.

[iv] At the end of the previous session Strauss encouraged students to read this passage from the *Republic* and its context.

[v] In original, not "toward"; "forward to" in the Shorey translation of the *Republic*.

> *Soc*: They will correct them then for their oven good, not chastising them with a view to their enslavement or their destruction, but acting as correctors, not as enemies.
>
> *Gl*.: They will, he said.
>
> *Soc*: They will not, being Greeks, ravage Greek territory nor burn their habitations, and they will not admit in any city all the population are their enemies and women and children, but will say that only a few at a time are their foe, those, namely, who are to blame for the quarrel. And on all these considerations they will not be willing to lay waste the soil, since the majority are their friends, nor to destroy the houses, but will carry the conflict to the point of compelling the guilty to do justice by the pressure of the suffering of the enemy.[vi]
>
> Aye, he said, that our citizens ought to deal with their Greek opponents on this wise, while treating barbarians as Greeks now treat Greeks.[vii]

LS: In other words, no holds barred in war against barbarians, but very strict limitations generally speaking, along the lines of Grotius, in wars among Greeks. That is perfectly true, and in order to understand that we must understand why Socrates introduces this odious distinction between Greeks and barbarians.

Let us look at two more passages for our immediate purpose.

Reader:

> And don't you think it is illiberal and greedy to punish a corpse, and is it not the mark of a womanish and heavy spirit to deem the body of the dead as enemy when the real foeman has flown away and left behind only the instrument with which he fought?[viii]

LS: Here it is obvious that there is no distinction made between a Greek and a barbarian corpse. So from Socrates' point of view, the distinction between the Greeks and barbarians in these matters is of course the great question. You note here that he speaks also of a womanish mind. The ladies will not hold me responsible for any nasty thoughts which Plato may have had. Now this is particularly strange because what is the context of the whole discussion here? The equality of the two sexes, and therefore that he[3] [adduces] this odious distinction just here is a sign of the difficulty.

We must note this much about the context, otherwise we are completely in the dark, and this is made clear in *Republic* 466. I think I can read it. I'll read it in the translation, when Socrates said: "is it not the thing that it remains to determine

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[vi] Shorey has "carry the conflict only to the point of compelling the guilty to do justice by the pressure of the suffering of the innocent."

[vii] The translation reads: "I, he said, agree that our citizens." *Republic* 470e-471b, in *The Collected Dialogues of Plato*, ed. Edith Hamilton and Huntington Cairns (Princeton: Princeton University Press, 1961), 573-844. The translator of this edition of the *Republic* is Paul Shorey.

[viii] In original, not "as enemy"; "an enemy." *Republic* 469d.

this,[ix] whether . . . it is possible for such a community to be brought about among men as it is in the other animals and in what way is it possible?"[x] You have anticipated, he said, the point I was about to raise.[xi]

In other words, he agreed that absolute communism is highly desirable, but how is it possible? So we are very eager. Because [if] it is not possible, we have to abandon it, although it looks very attractive. Now how does this go on? "For as there are wars . . . the manner in which to conduct them is too obvious for discussion."[xii] And it is not at all obvious to[4] [Glaucon], and so there is a long discussion of war. The question of possibility is dropped and never answered. The whole business of communism and equality of the two sexes remains up to the end, but Plato does not make these[5] [apparent omissions] without good reason. In the very context you get the answer why equality of the sexes and therefore communism regarding women and children is not possible:[6] [the] phenomenon of war itself. Socrates says men and women differ only by strength or weakness. Men are generally stronger than women [456a]. The difference between the two sexes comes out in war, [even] apart from strength or weakness. You have different categories of troops, having more men than women and vice versa. But apart from that, there are more obvious things which no women, however much in favor of full equality, can deny.

The question is discussed very soon: What about children? The children must be spectators of war [467c]. That has to be explained, but that has to be done carefully[7] [so that] in case of a rout, nothing would happen to them. But the question of the next generation: What does the survival of the males on the one hand, and the females [on the other] mean for the population figure in the next generation? Speaking from a very low and practical point of view . . . .

Student: If you lose ninety percent of your men, you may be able to repopulate in thirty years.

LS: Even more [than ninety percent], perhaps.

Student: But if you lose ninety percent of your women, you're in very serious trouble.

LS: One man can fertilize many women and the opposite is obviously not true. Therefore, if we take into consideration this fact, we see a crucial difference and why women should not be sent into war. But to come back to the broader point, we have here a statement coming very close to what Grotius wants about limitations on warfare, here explicitly mentioned as to only warfare among Greeks. A high standard of conduct in war, but it is war, and does not war necessarily have a lower conduct than in peace?

[ix] In original, not "is it not the thing"; "is not the thing."
[x] Shorey has "whether, namely, it is possible."
[xi] The word "he" is marked inaudible in the original transcript.
[xii] In original, not "as there are wars"; "as for our wars."

I'll read you a passage from Plato's equal, as Milton called[8] [him, Xenophon].[xiii] In the *Education of Cyrus*, Book 1, chapter 6, paragraph[9] 27 following. Cyrus, just appointed general, has a conversation with his father, the king of Persia, who was once also a general.

> If your general is to succeed, he must prove himself an arch-plotter, the king of craft, full of deceits and stratagems, chief thief, and robber, defrauding and overreaching his opponent at every turn.[xiv]

I mean, that he does not say a killer, it is clear, because it is obvious. Cyrus burst out laughing:

> is this the kind of man you want your son to be! I want him to be, said the father, as just and upright and law-abiding as any man who ever lived. But how comes, said Cyrus, that the lessons you taught us in boyhood and youth were exactly opposed to what you teach me now?[xv] Ah, said the father, those lessons were for friends and fellow-citizens, and for them they still hold good, but for your enemies—do you not remember that you were also taught to do much harm?
>
> No, father, he answered, I should say certainly not.
>
> Then why were you taught to shoot? Or to hurl the javelin? Or to trap wild-boars? Or to snare stags with cords and caltrops?[xvi]
>
> But father, Cyrus answered, if to do men good and to do men harm they are both things we ought to learn, surely it would have been better to teach them in actual practice?[xvii] [**LS**: And not only with[10] [wild beasts].]
>
> Then the father said, my son, we are told that once in the day of our forefathers there was such a teacher once.[xviii] This man did actually teach his boys righteousness in the way you suggest, to lie and not to lie, to cheat and not to cheat, to calumniate and not to calumniate, to be grasping and not grasping.[xix] He drew the distinction between our duty to friends and fellow citizens and our duty to enemies; and he went further still; he told men that it was just and right to deceive even a friend for his own good, or steal his property. [**LS**: For his own good] And with this he must teach his pupils to practice on one another what he taught them,[xx]

[xiii] Milton makes this comparison in *Apology for Smectymnus*.

[xiv] The Dakyns translation: "If your general is to succeed, he must prove himself an arch plotter, a king of craft, full of deceits and stratagems, a cheat, thief, and robber, defrauding and overreaching his opponent at every turn."

[xv] In original, not "how comes it, said "Cyrus"; "how comes, said his son."

[xvi] "Or to snare stags with cords and caltrops?" is marked inaudible in the original transcript. Xenophon inserts two full paragraphs between "caltrops" and "But father." This insertion is not in the original transcript.

[xvii] In original, not "they are both things we ought to learn"; "they were both of them things we ought to learn."

[xviii] In original, not "once in the day"; "in the day."

[xix] Both occurences of "calumniate" are marked inaudible in the original transcript.

[xx] In original, not "he must teach"; "he must needs teach."

> just as the people of Hellas, we are told, teach lads at the wrestling-school to fence and to feint, and train them by their practice with one another.[xxi]

And this led of course to terrible disorders, and therefore the Persians made it a law: As long as they are kids, the lessons will only be nice; but when they have reached the age of discretion, then they will learn these subtle distinctions. Be nice to your fellow citizen, be nasty to your enemy. And that is the point.

These are two quite remarkable statements in [the] classic simplicity of[11] [their] formulation. Let me now restate it in somewhat different terms. You see what Grotius grapples with. There is such a thing which we call virtue, and the most extensive statement, the most beautiful statement still available, is Aristotle's *Nicomachean Ethics*: courage, moderation, temperance, justice, among all the other virtues. Although Grotius has a somewhat irrelevant criticism of Aristotle, that is clear to him. There is such a thing as virtue and this gives[12] [both Grotius and Aristotle] the highest standard. But is it feasible to live according to this all the time? Because the clearest case is that of war, of course: we must act justly and never hurt innocent people, but war means hurting innocent people. If a city is sacked, even if you are the kindest and justest of men, to find out first whether this man is innocent or not is impossible—and so on, and more terrible things, even.

So these difficulties have now led some people called cynics to say that [it] is nonsense to expect anything of this kind in war, no holds barred, and this has of course crucial effects for the city and civil society itself. As it were, if you are always besieged, in a state of siege, this naturally affects life. It[13] [has] the consequence that rules to be obeyed by soldiers in an army are different than rules obeyed by[14] [civilians]. You have to train people to explore enemy territory and to find out by any means what the intentions of the enemy government are, and it is practically impossible to draw a line there. It is always a difficult moral problem whether you may employ, use, indecent people. Grotius has said that if you don't want to have any dealings with unjust or bad people, you will never have an army.[xxii] And you must have an army. So the alternative view says: Well, the fundamental phenomenon is that the city is exposed to other cities, war, and this affects even the peaceful life of the city itself.

So here we have clear positions, say, the Platonic-Aristotelian view, and the Machiavellian view. This we can safely say to begin with: Grotius is trying to find a middle way between strict morality and sheer Machiavellian[ism]. Another thing is also clear: that such a way was practically found and used in law all the time. Whether a[15] [transaction] is legally valid or not has nothing to do with the moral character of the seller or buyer, and we have to see this example which Grotius used more than once. It is a very harmless example—I mean, not shocking. A spendthrift—and waste is of course a vice,[16] [recklessly] giving away one-hundred dollar bills. Is the receiver of that, regardless of

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[xxi] The words "the people of Hellas, we are told" are marked inaudible in the original transcript. Xenophon, *Cyropaedia: The Education of Cyrus*, trans. Henry Graham Dakyns (found at http://www.gutenberg.org/files/2085/2085-h/2085-h.htm#2H_4_0004).

[xxii] Grotius made this statement at 2.17.20.1, a passage discussed by Strauss in session 8.

whether he is rich or poor—does he own it justly, lawfully? Of course he does. And if[17] [one] finds this all around, and if[18] [one] were to insist in each case [that] the highest moral standards were to be preserved, that no one must accept any gift from a spendthrift—even if he is starving, maybe—this wouldn't work.

So law is law, deliberately[19] [looser] than morality is. This [way] was well paved and was well understood, but the question is: To what extent did it find a theoretical expression, to what extent did[20] [the tradition] try to say [that] law cannot possibly go beyond this line? Let me make it clear. [LS writes on the blackboard] If this is Machiavelli, and this is Plato and Aristotle, law is surely around here, and in some cases higher and in some lower. But what is the principle? It was only understood that you cannot possibly enforce everything. There are things which by nature preclude enforcement. The simplest example is gratitude. If gratitude becomes enforceable, it ceases to be gratitude. Another case is how far to go regarding gambling. How far to go regarding prostitution? How far to go regarding freedom of speech?

Generally speaking, in modern times theoreticians tried to find a basis[21] [in] principle for making the distinction: things where coercion is impossible [or inappropriate]. One point, of course, was crucial, and that was virtue. It was always understood that true virtue is voluntary. No one can be coerced to act virtuously. And this was taken as approved in modern times—law,[22] civil society as such, has nothing whatever to do with virtue. But these are not as simple, because until people have reached the maturity which some people never reach, to act virtuously they must be coerced in one way or the other to act virtuously, or coerced against acting viciously, so therefore the line is not so simple to draw between what the city may or may not do. In our generation, we have been witnesses of a great change, where the emphasis on property rights is now on human rights, a very different way of drawing the line. According to the older view,[23] human rights are something with which society must not be concerned. From the successive point of view, one could rather say: No,[24] property rights are very much the affair of civil society.[xxiii]

So Grotius belongs already to the beginners of these men who tried to find a distinction of principle, to find . . . and he does it more specifically in this way: by making a distinction between justice narrowly understood and the other virtues. Now justice narrowly understood is of course defined by natural right, and therefore he is concerned with making a distinction within natural right between justice strictly understood and justice in the broad sense. This in itself leads to an emphasis on the rights of the individual, and of course self-preservation and the things connected with self-preservation. One can then say that the question is whether Grotius succeeds in

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[xxiii] The thought behind the last two sentences might be that "human rights," as currently understood, includes rights to such things as employment or "dignity" that were not formerly part of the purview of government. Property rights might be considered "the affair of civil society" today in the sense that intrusive restriction or regulation of property is considered a matter of course. The Marxist distinction between "human rights" and "property rights" may also be in the background.

making this kind of natural right, natural right in the strict sense, the basis of his whole teaching regarding international law.

Now let us first turn to chapter 1, the third Book, paragraph 2.

Reader:

> First, as we have previously said on several occasions, in a moral question things which lead to an end receive their intrinsic value from the end itself. In consequence, we are understood to have a right to those things which are necessary for the purpose of securing a right, when the necessity is understood not in terms of physical exactitude but in a moral question.[xxiv] By right I mean that which is strictly so called, denoting the power of acting in respect to society only.[xxv]

LS: So in other words, [that] the right to the ends gives you the right to the means does not mean of course[25] *any* means, but it must be means in accordance with the right. You have a right to find money for your sustenance, and this is understood only by permissible means, naturally—not by armed robbery and so on, which in one way can be a means for getting money but is wholly incompatible with the end understood as rightful living. So here right strictly understood includes the consideration of society. That is crucial. Man is a social animal, and that is the basis of natural right. That is unchanged for Grotius and will not be changed before Hobbes.

Then he comes to the question which takes up quite a bit of space: the question of ruse,[26] [deception], lying, etc. In paragraph 6 he states a case for[27] [ruses]. The strict view was stated by Cicero, quoted in paragraph 7.

Reader:

> It must be observed, then, that deceit is of one sort in a negative action, of another sort in a positive action. The word deceit I extend, of the authority of Labeo,[xxvi] even to those things which occur in a negative action; he classes it as deceit, but not harmful deceit, when anyone "protects his home or another's possessions through dissimulation." It cannot be doubted that Cicero spoke too sweepingly when he said: "Pretense and dissimulation must be removed from every phase of life."[xxvii]

LS: In other words, that is an extreme statement. Cicero is speaking to his son. Well, one cannot be too strict[28] in giving advice to[29] children, especially one's own children. The dreary lesson that qualifications are needed will be learned very easily.

[xxiv] In original, not "question"; "sense" in Kelsey's translation.
[xxv] *JBP*, 3.1.2.1.
[xxvi] In original, not "of the authority"; "on the authority." The name "Labeo" is marked inaudible in the original transcript.
[xxvii] *JBP*, 3.1.7.1.

Student: In the context of business transactions, he does not say it quite as straightforwardly.

LS: That this is not Cicero's last word goes without saying. He was a politically[30] experienced man. To make it quite clear, this would be the extreme—an unqualified statement without any[31] [loopholes], but this cannot be considered even at the beginning of the argument. It is made clear that ruses in actions as distinguished from speech, or [dis]simulation, is surely permitted. That is developed in paragraph 8, as you will see when we come to that. But lying is of course a key question and that is taken up in paragraph 9. Let us read the first section.

Reader: "Of greater difficulty is the discussion with respect to those types of deceit, if I may say so, which are in common use by men in commerce and in which falsehood in the true sense is found."[xxviii]

LS: Commerce means of course not only trade but intercourse of human beings, but we may also mean commerce in the narrower sense of the word. It is strictly forbidden in the Bible and he quotes here Proverbs, Psalms, and Letter to[32] [the Colossians].[xxix] And later on he quotes Augustine in the next section. Let us read section 2 of the same paragraph.

Reader:

> Nevertheless, authority is not lacking in support of the opposite view also. In the first place in Holy Writ, there are examples of men cited without a mark of censure; and, in the second place, there are the declarations of the early Christians Origen, Clement, Tertullian, Lactantius, Chrysostom, Jerome, and Cassian.[xxx] Indeed, of nearly all, as Augustine himself acknowledges. Although disagreeing with them, he nevertheless recognizes that it is a "great problem," "a discussion full of dark places," "a dispute in which the learned are at variance" to use words which are all his own.[xxxi]

LS: I seem to remember that this is not a genuine Augustinian statement.[xxxii] It is one of these questions printed together with a vulgate text. Do you remember? It doesn't make any difference, because Grotius surely regarded it as genuine, but Augustine is regarded by Grotius as the man who defends the most strict view and makes no concessions. That is of some importance. Therefore, he will be compelled later on to engage in open polemics with Augustine, or at least against this extreme side in Augustine.

[xxviii] In original, not "types of deceit, if I may say so, which are in common use"; "types of deceit which, if I may say so, are in common use."
[xxix] Grotius quotes from Proverbs 13:5 and 30:8, Psalms 5:6, and Colossians 3:9 at 3.1.9.1.
[xxx] Marked "[inaudible] . . . " in the original transcript are the names "Origen, Clement, Tertullian, Lactantius, Chrysostom, Jerome, and Cassian."
[xxxi] *JBP*, 3.1.9.2.
[xxxii] The text of Augustine's *On Lying* may be found at http://www.newadvent.org/fathers/1312.htm. See especially para. 38. *New Advent*, the publishers of this and other Christian texts, express no doubts concerning its authenticity.

The use of ambiguous words is of course a[33] [ruse based] on cleverness—that is clear. And it is forbidden to lie only when the other has a right to the truth that[34] [simulates the relationship of] seller and buyer.[35] [The buyer] has the right to know whether[36] [the seller's] merchandise is damaged or not. And of course,[37] [sometimes it is perfectly acceptable to] lie to children and men. If someone says to a child that children are brought by the stork, it is not an indecent and vicious act. I may say the untruth to a man who knows it to be untrue. I may joke, even if someone else is present who would take it to be true but whom I do not address. Now then of course the question arises: Do I mean to deceive him? The principle is stated in paragraph 14.

Reader: "The reason is given by Proclus in commenting on Plato: 'For that which is good is better than the truth.'"[xxxiii]

LS: Yes, that which is good is better than the truth. You see here incidentally one implication of this very ambiguous Platonic statement in the idea of the good, and that the good is higher than the truth, which has a very profound metaphysical meaning. But it has also this practical meaning, that the good is superior[38] [to] the truth. For example, a general or a doctor may deceive the soldiers or patients, respectively. The government may deceive the subjects. This does not apply to God and his government. The exception to the prohibition against lying is discussed in paragraph 17.

Reader:

> The principle which the learned generally lay down, that it is permissible to speak falsely to an enemy, go beyond what we have just said. Accordingly, to the rule forbidding a lie the exception, unless against enemies, is added by Plato and Xenophon; and also by Philo among the Jews, and by Chrysostom among the Christians.[xxxiv] To this exception you would perhaps refer the lie of the men of Jabesh when under siege,[xxxv] as recorded and wholly written,[xxxvi] and the similar exception on the part of the Prophet Elijah;[xxxvii] also that of the Valerius Laevinus, who boasted that he had slain Pyrrhus.[xxxviii]

LS: So the general view is that you may lie to enemies, in war especially. And here in this context, he has to take up the question of Augustine in section 3 of this paragraph.

Reader:

[xxxiii] "Proclus" is marked inaudible in the original manuscript. *JBP*, 3.1.14.2.
[xxxiv] In original, not "and also by Philo"; "also by Philo."
[xxxv] The words "the lie of the men of Jabesh when under siege" are marked inaudible in the original transcript.
[xxxvi] In original, not "and wholly written"; "in Holy Writ" in the translation.
[xxxvii] In original, not "the similar exception on the part of the Prophet Elijah"; "the similar deception on the part of the prophet Elisha."
[xxxviii] "Valerius Laevinus" and "Pyrrhus" are marked inaudible in the original transcript. The first of these names is not preceded by the definite article in the translation. *JBP*, 3.1.17.1.

> These doctrines do not meet with the approval of the school of writers of recent times, since in almost all manners[xxxix] they have chosen to follow Augustine alone with the teachers of antiquity.[xl] But the same school admits of unspoken interpretations, which are so repugnant to all practice that when they question[xli] whether it would not be more satisfactory to admit to certain persons the use of falsehoods in the cases we have mentioned, or in some of them (for I assume that nothing has been settled),[xlii] than so indiscriminately to exempt such interpretations from the definition of falsehood. Thus when they say "I do not know," it may be understood as "I do not know so as to tell you"; and when they say "I have not" it may be understood as "so as to give you"; and other things of this sort—

LS: [Mental] reservations.[xliii]

Reader: "which the common sense of mankind repudiates, and which, if admitted, will offer no obstacle to our saying that whosoever affirms anything denies it himself, and whoever denies affirms."[xliv]

LS: In other words, the strict rule would lead only to circumvention, and to a[39] [casuistry] which is hard to distinguish from dishonesty. Regarding Augustine, he mentions in note 3 to paragraph 16, "even Augustine"—in other words, Augustine is the incarnation of the extreme view which tries to forbid any[40] [form of lying] unqualifiedly. Paragraph 20, the beginning.

Reader:

> We know, too, that certain types of fraud, which we have said were naturally permitted, have been rejected by some peoples and persons. But this does not happen because they view such means of deception as unjust, but because of a remarkable loftiness of mind, and, in some cases, because of confidence in their strength.[xlv]

LS: So in other words, they can afford always to tell the truth. You see here that there is again the distinction between right strictly understood and virtue in general, so it may be true from the broadest view of virtue [that] all lies are bad, but right strictly understood cannot possibly substantiate [this].

[xxxix] In original, not "manners"; "matters."
[xl] In original, not "with the teachers of antiquity"; "of the teachers of antiquity."
[xli] In original, not "that when they question"; "that one may question."
[xlii] In original, not "that nothing has been settled"; "that nothing has been settled here."
[xliii] Grotius is describing what was called the doctrine of "mental reservation" in moral casuistry. See the article "Mental Reservation" in the Catholic Encyclopedia online (http://www.newadvent.org/cathen/10195b.htm).
[xliv] *JBP*, 3.1.17.3.
[xlv] *JBP*, 3.1.20.1.

In paragraphs 21 and 22, I have not quite understood[41] whether he[42] [says] that it is unjust to induce a subject of an enemy state to become a traitor to his country. For present-day interpretations, I believe this is quite strict. I think it would not be regarded as practical by the CIA.[xlvi] This shows the enormous difficulty to draw a line here.

What is the subject of the next chapter in the first paragraph?[xlvii] By nature, under natural right, no one is bound by another man's act except the heir, and this follows from natural equity which is an expression used in the first section of the first paragraph, *i.e.*, right of nature.[xlviii] Paragraph 2, beginning.

Reader:

> Although what has been stated as true,[xlix] nevertheless by the volitional law of nations there could be introduced, and appears to have been introduced, the principle that for what any civil society, or its head, ought to furnish, either for itself directly,[l] or because it has bound itself with the debt of another by not fulfilling the law,[li] for all this there are held and made liable all the corporeal or incorporeal possessions of those who are subject to such a society or its head.
>
> This principle, furthermore, is an outgrowth of a certain necessity,[lii] because otherwise a great license to cause injury would arise; the reason is that in many cases the goods of rulers cannot be so easily seized as those of private persons.[liii] This then finds place among those rights which, Justinian says,[liv] have been established by civilized nations in response to the demands of usage in human needs.[lv]

LS: This is another example of the difference between the right of nature and the *ius gentium*, and the changes made owing to some necessity, and the necessity means that if the change were not made, the impossibility of complying with natural right would make matters much worse than it is without accepting this compromise. This is a point which we must keep in mind when we discuss this subject later on.

We turn now to the third chapter. In paragraph 2 of chapter 3, he takes up this question of the distinction between a band of robbers and[43] [a commonwealth], and it is a bit more complicated.

[xlvi] It is not clear what Strauss has in mind here. During the Cold War (as at other times, of course), inducing operatives to betray their country by blandishments, blackmail, or other inducements, was not uncommon.
[xlvii] *JBP*, 3.2.1.1
[xlviii] The expression is *aequitati naturali*.
[xlix] In original, not "as true"; "is true."
[l] In original, not "either"; "whether."
[li] In original, not "bound itself with"; "bound itself for."
[lii] In original, not "an outgrowth"; "the outgrowth."
[liii] Kelsey has "cannot so easily be seized as those of private persons, who are more numerous."
[liv] In original, not "Justinian says"; "as Justinian says." See Justinian *Institutes* 1.2.2.
[lv] In original, not "in human needs"; "and human needs." *JBP*, 3.2.2.1.

Reader:

> Cicero, then, spoke too sweepingly when he said, *On the Commonwealth*, Book 3, that where an unjust man is king, or where the aristocracy or the people itself is unjust, there is not a wicked state, but not at all.[lvi] In correction of this,[lvii] Augustine says: "Nevertheless, I should not go so far as to assert that the people as such does not exist, or that its organization is not a state, so long as there remains some sort of union in a reasoning populace, associated through harmonious cooperation in the things which it chooses."[lviii] A body that is sick is nevertheless a body still; and a state, although seriously diseased, is a state so long as there remain tribunals of the other agencies that are necessary in order that foreigners,[lix] no less than private citizens, in their relations one with the other may obtain their rights.[lx] Theocrasaston offers a more correct judgment in saying that the law[lxi] (especially that which goes to make up a universal common law)[lxii] exists in a state just as the mind in a human body; for when this is taken away the state ceases to exist.[lxiii]

LS: Here again a deliberately lower view.[44] The alternative would be a theoretically greater perfection but practically, a greater ruin. Paragraph 6.

Reader:

> To understand the foregoing passages, and others dealing with the declaration of war, we must carefully distinguish what is due according to the law of nature, what is not due by nature but honorable,[lxiv] what is required by the law of nations to secure the effects peculiar to this law, and what, in addition, is derived from the particular institutions of certain peoples.
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> In the case where either an attack is being warded off,[lxv] or a penalty is demanded from the very person who has done wrong, no declaration is required by the law of nature. This is what Sthenelaidas, the ephor says of Thucydides.[lxvi]

LS: We don't need the examples. Let us turn to section 3.

Reader:

[lvi] In original, not "not at all"; "none at all."
[lvii] In original, not "in correction of this"; "in correction of this view."
[lviii] In original, not "cooperation"; "participation."
[lix] In original, not "of the other agencies"; "and the other agencies."
[lx] In original, not "may obtain their rights"; "may there obtain their rights."
[lxi] In original, not "Theocrasaston"; "Dio Chrysostom."
[lxii] In original, not "a universal common law"; "the universal common law."
[lxiii] In original, not "a human body"; "the human body." *JBP*, 3.3.2.2.
[lxiv] In original, not "but honorable"; "but is honorable."
[lxv] In original, not "the case"; "a case."
[lxvi] In original, not "says of"; "says in." The reference is to Thucydides, *History* I.86. "Sthenelaidas, the ephor" is marked inaudible in the original transcript. *JBP*, 3.3.6.1.

> But even in case the law of nature does not require that such a demand be made, still it is honorable and praiseworthy to make it, in order that, for instance, we may avoid giving offense, or that the wrong may be atoned for by repentance and compensation, according to what we have said regarding the means to be tried to avoid war. Here applies this verse also:
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> At first no one has sought to try extremes.
>
> Here, too, applies the command which God gave to the Jews, that they should first invite to peace the city which was to be attacked. This command, although given to that people for a particular case, has been wrongly confused by some with the law of nations. For the peace thereto referred[lxvii] is not peace in general, but one dependent upon conditions of subjection and tribute. When Cyrus came into the territory of the Armenians,[lxviii] before doing harm to anyone he sent to the king those that represented him in order to demand a tribute of soldiery due according to the treaty,[lxix] "thinking that this was a more friendly procedure than to advance without previous declaration," as Xenophon says in his *History*.[lxx] But by the law of nations a proclamation is required in all cases in order to secure these particular effects, it is not, however, from both parties but from either party.[lxxi]

LS: What does this mean? By the law of nations, things which are not obligatory according to natural right do become obligatory, and yet they are at the same time required by *honestas*, by virtue in the broader sense. So you see *ius gentium* is not necessarily lower than natural right strictly understood; it may also be higher. Is this clear? I mean if it becomes accepted by a large number of people.

Student: Would *ius gentium* require a declaration in the case of self-defense or punishment, or was he referring simply to the recovery that he started talking about in section 2?

LS: I think we have to take it strictly, narrowly, here [and limit ourselves to] what he is explicitly speaking about. Here he refers of course to Xenophon's[45] [*Education of Cyrus*], I take it—I haven't looked it up.[lxxii] This of course is not an historical book, it is a piece of fiction. This book presents Xenophon's view of a perfect ruler, and it is not history; but for Grotius' purpose it doesn't make such a difference. It of course would be important for the question: Can an empire be established by these means? A closer analysis would show that Xenophon has taken care[46] [to present] the difficulties, and Cyrus is not such an angel as he seems to be at first sight.

[lxvii] In original, not "thereto referred"; "there referred to."
[lxviii] "Cyrus" and "Armenians" are marked inaudible words in the original transcript.
[lxix] Kelsey has "those who represented him in order to demand the tribute and soldiery."
[lxx] In original, not "'without previous declaration'"; "'without a previous declaration.'"
[lxxi] Kelsey has "to secure these particular effects, not, however, from both parties but from either one." *JBP*, 3.3.6.3.
[lxxii] *Education of Cyrus* II.4.31-2.

Let us turn to chapter 4. I believe here we have the passage on[47] [our list], if I am not mistaken. Paragraph 2, the beginning.

Reader:

> But let us see the import of the "will become permissible" in Virgil's line. For sometimes that is said to be permissible which is right from every point of view and is free from reproach, even if there is something else which might more honorably be done, as in the case of the statement of Paul the Apostle:[lxxiii] "all things, (and that is of the things which he touched upon and was going to discuss), are lawful for me, but not all things are expedient."[lxxiv]

LS: The Greek word *exestēs* is the same as the Latin word,[48] [*licebit*]. Therefore *exesteia* comes close to *ius* in the sense of[49] ["permissible."][lxxv]

Reader: "Thus, it is lawful to contract marriage, but for a holy purpose chastity or celibacy is more worthy of praise."[lxxvi]

Student: There are some things which can be done without being against natural right.[lxxvii]

LS: But if it is strictly permitted, for example, taking a walk, this would be of no particular interest. It is surely blameless from every point of view. We have to specify a question to get the meaning of this. Take this case: the man who accepts a gift from a spendthrift, he is surely blameless in the eyes of the law. He may do it without any question. But if he knows that this is a spendthrift, is he still blameless?

[lxxiii] In original, not "as in the case of the statement of Paul the Apostle"; "as indicated in that statement of Paul the Apostle."

[lxxiv] Inside the parentheses Kelsey has "(that is of the sort which he had touched upon and was going to discuss)." *JBP*, 3.4.2.1.

[lxxv] The word translated as "is lawful" from Paul (1 Corinthians 10:23) is *exesin* which literally means "is permissible" or "is possible."

[lxxvi] The tape was changed at this point; the remainder of the paragraph is taken from the translation and supplied here: "as Augustine, following the same apostle, wrote to Pollentius. Also to marry a second time is lawful, but it is more honorable to be content with one marriage; this is according to the correct elucidation of that question by Clement of Alexandria. A Christian husband may lawfully leave his pagan wife, as Augustine thinks (this is not the place to discuss in what circumstances this is true), but he may also keep her, and so Augustine adds: 'Either course is indeed equally permissible according to the justice which waits upon the Lord; and so the Lord forbids neither of them, but each one is not expedient.' Ulpian says of the seller who is permitted to empty out wine after the appointed day: 'Nevertheless it is more praiseworthy if he does not empty it, when he might do so.'" *JBP*, 3.4.2.1.

[lxxvii] Since the tape was changed at this point, there may have been discussion preceding this remark.

Student: For Grotius, I think any vice in Aristotle's sense, aside from that part of Aristotle's justice which is Grotius' natural right, any vice is permissible. It is not contrary to Grotius' natural right.

LS: I see. Then this fear of *licere*[lxxviii] coincides with right strictly understood. I'm sure this is not sufficient what I say, but I try to get a better formulation.

Student: I have a feeling, this fear of *licere*, the actions which are not in their nature harmful and so forbidden, or not by their proper nature particularly to be commended, and so generally recommended, nor yet are they by their very nature indifferent, it is clear by their nature that it matters. Unfortunately, it is things which are accidental or their circumstances that determine whether this important thing will be good or bad in a particular case, an example being leaving a pagan wife. It is plainly important whether you divorce or not, but the act of leaving her by its nature alone does not answer the question, and is permitted by its own nature. May a man leave a pagan wife? Maybe yes, maybe no.

LS: But there would be cases in which it would clearly be right and clearly wrong, but you cannot speak universally. Therefore, what you can say universally is only vague. I do not know whether this is sufficient—a kind of penumbra about which one cannot speak in general, but you could speak precisely if all the facts of the case were before you. Is this what you mean?

Student: He introduces this in Book 2, chapter 23, the idea that [the] "permissible" is[50] between those things that are clearly forbidden and those things that are clearly commanded. Our law is not so all-encompassing that there wouldn't be such things.

LS: I am sorry I cannot spell it out now, but while this is a part of the issue, I do not believe that[51] [that is the whole of it]. There is surely a lower meaning of permissive which means simply "it cannot be punished"—but this means of course that this is something which is not nice but for which you cannot be punished. This is the lowest. Now many things are in accordance with right strictly understood, which one nevertheless would not [be compelled to] do, and they would be "permitted" in[52] [a higher] sense. Now let us come to concrete examples, in paragraph 3 of this same chapter.

Reader: "In this sense, we often see what is permitted contrasted with what is right. Such a contrast is presented by Seneca the Father more than once in his—"[lxxix]

LS: Is this paragraph 3? I mean paragraph 3.

Reader:

[lxxviii] *Licere* (to permit, in Latin) is the root of the words Grotius is employing for permissions apart from and even contrary to natural law.
[lxxix] *JBP*, 3.4.2.3.

> With this restriction, then,[lxxx] it is permitted to harm an enemy, both in his person and in his property; that is, it is permissible not merely for him who wages war for a just cause, and who injures within that limit, a permission which we said at the beginning of this book was granted by the law of nature, but for either side indiscriminately.
>
> As a consequence, he who happens to be caught in another's territory cannot for that reason be punished as a murderer or a thief, and war cannot be waged upon him by another on the pretext of such an act. With this meaning we read in Silus "To whom in the hour of victory all things were permitted by the law of war."[lxxxi]
>
> The reason why such effects met with the approval of nations is this:[lxxxii] To undertake to decide regarding the justice of the war between two peoples had been dangerous for other peoples,[lxxxiii] who were on this account involved in a foreign war; just so the Massilians said, in relation to the struggle between Caesar and Pompey,[lxxxiv] that it was not within the province of their judgment and their power to determine which party had a juster cause.[lxxxv]

LS: So what is the status of this law? One may have hurt the enemy, even the unjust enemy. What is the status of that law? To which body of law does it belong?

Student: What happens is that once war is declared, the *ius gentium* says that anything goes. That is, what [is merely] "permissible" has become[53] [law]. Permission was first blameless; it was between what was commanded and what was forbidden. That is what natural right says permission is. *Ius gentium* says: Once you declare war, anything goes.

LS: This example is clear. According to strict natural right, not everything goes:[54] only the just enemy may declare war, but according to *ius gentium*, any enemy may declare. The other is the principle, you know, the principle of the distinction between right of nature and *ius gentium*, or the meaning of[55] ["permission"]. The meaning can be illustrated by examples but cannot be clarified by that.

Student: I would say that in the first case *licere* cannot be blamed on the basis of natural right; in the second case, it can be blamed and is blamed clearly, but it cannot be punished.

LS: So we have then a threefold distinction: first is the highest morality, what virtue demands; then what right strictly understood demands—this is much less; and finally, what is punishable, which is still less. Is this the clear distinction? But of course these distinctions do not[56] [coincide with] natural right and *ius gentium*. At least I do not see

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[lxxx] In original, not "then"; "therefore."
[lxxxi] In original, not "Silus"; "Sallust."
[lxxxii] In original, not "is this"; "was this."
[lxxxiii] In original, not "the war"; "a war."
[lxxxiv] "Massilians," "Caesar," and "Pompey" are marked inaudible in the original transcript.
[lxxxv] In original, not "a juster cause"; "the juster cause." *JBP*, 3.4.3-4.

this. The *ius gentium* must be[57] [limited] to what is punishable, because of its eminently practical character.

Student: That develops later. Rape is not allowed. There are certain qualifications which enter in the *ius gentium,* but generally, aside from these qualifications, anything goes. That means anything is permissible—not punishable.

LS: Let us see whether this will work.

Student: *Ius gentium* seems to enter in two directions. *Ius gentium* breaks the natural law and allows the unjust to ravage the territories of the just, but earlier *ius gentium* said: No, you must declare war. You must try and settle this thing, which is obviously a higher consideration than when natural law said that if he attacked you, burn his city. So that neither contains the other.

LS: I think we will come to a clearer formulation very soon. Let me see. The right to kill women and children, as only an idea of how much goes. In paragraph 9 he gives the example as a good precedent, the story of[58] [Mycalessus] told by Thucydides in the[59] Seventh Book [of his *History*];[lxxxvi] you know when the savages from[60] [Thrace] entered a Greek city, and they had an unusually large school in this small town, and all the children, and even all the[61] [women and animals], these savages killed. Now this atrocious story of an atrocity is regarded by Grotius as a precedent which shows what you may do, if I have not misunderstood it. But let us look at it, paragraph 9, section 2, the beginning.

Reader: "In ancient times, as Thucydides relates, upon capturing Mycalessus the Thracians slew both women and children. Arrian records the same of the Macedonians[lxxxvii]—"

LS: This is a precedent. And of course you may kill captives. Paragraph 10, section[62] 2.

Reader: "So far as the law of nations is concerned, the right of killing sub-slaves,[lxxxviii] that is, captives, while in war,[lxxxix] is not precluded at any time, although it is restricted, now more, now less, by the laws of states."[xc]

LS: Quite shocking, isn't it?

Student: The best example, I think, is that the law of nations does not allow poisoning of one's enemies, although by the law of nature that would be allowed.[63] [Is that] not a higher type of consideration?

[lxxxvi] Thucydides, *History* VII.28-31.
[lxxxvii] "Mycalessus" and "Arrian" are the names invoked by Grotius. *JBP*, 3.4.9.1.
[lxxxviii] In original, not "sub-slaves"; "such slaves."
[lxxxix] In original, not "while in war"; "taken in war."
[xc] *JBP*, 3.4.10.2.

LS: In one sense it is a kind of chivalrous—there is a kind of chivalry which may come in through the law of nations, which does not belong to the law of nature.

We come now to a key passage regarding this question. In paragraph 15, first section.

Reader:

> However, just as the law of nations, through that form of permission which we have now explained, permits many things which are forbidden by the law of nature, so it forbids certain things which are permissible by the law of nature. If you take account only of the law of nature, in case it is permissible to kill a person, it makes no difference whether you kill him by the sword or poison him. By the law of nature, I repeat, for it is indeed more noble to kill in such a way that he who is killed may have a chance to defend himself; but this is not an obligation due to one who has deserved to die. Nevertheless, from old times the law of nations—not of all nations,[xci] certainly those of the better sort—has been that it is not permissible to kill an enemy by poison.
>
> Agreement upon this matter arose from a consideration of the common advantage, in order that the dangers of war, which had begun to be frequent, might not be too largely extended.[xcii] And it is easy to believe that this agreement originated with kings, whose lives are better defended by arms than those of other men, that are less safe from poison,[xciii] unless they are respected by some respect for law[xciv]—

LS: Now what is the key point? This is one of the rare statements about the relation of the *ius gentium*[64] [to] the right of[65] [nature]. First, the right of nations may permit what the right of nature forbids, for instance the killing of women and children. Is this a good example? The right of nature forbids that.

Student: You would make the distinction on the basis of just and unjust. The right of killing indiscriminately would be what *ius gentium* allows and natural right does not. But the law of nature permits the killing of women and children in the case where it is necessary to punish the real offender, *i.e.*, if they are in the house together.

LS: But normally, no. And the right of nations may forbid what the right of nature permits, namely, for example, the killing of enemies by poison. We have to take this up next time perhaps in a broader context: What becomes of the practical importance of the right of nature if it can be changed by human agreement,[66] [by the] *ius gentium*? There is no difficulty where *ius gentium* forbids what the right of nature permits. If the right of nature permits killing by poison and *ius gentium* forbids it, one can only say: Well, all life has to become somewhat more humane, and this is in the spirit of natural right. But if it is the other way, if prohibition like the killing of innocent people recognizable as

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[xci] In original, not "not of all nations"; "if not of all nations."
[xcii] In original, not "largely"; "widely."
[xciii] In original, not "that are less safe"; "but are less safe."
[xciv] Kelsey has "protected by some respect for law and by fear of disgrace." *JBP*, 3.4.15.1.

innocent—babies of six months cannot have done anything against you—if this is permitted,[67] [what force does the law of nature have any more]? To what extent can the right of nature remain a standard when it is changeable in this way?

Student: I think it is not the right of nature which is changeable. What has happened is that the key right of natural right in international law [becomes]: We must tolerate certain things that are clearly contrary to natural right. And he is going to point it out; it is blameworthy, but it's there. Natural right does not change. *Ius gentium* allows [violations of] it.

LS: But what does it mean [to say] it "does not change"?

Student: I think the importance would be limited to this extent—[68] [praise is due to] rulers that follow the principles of justice as opposed to permission in this sense. It is permitted, but don't do it. He gives quotes, too, *i.e.*, I could have done that to you by the law of war, or you could have done that to me by the law of war, a sort of exhortation beyond the law of war.

Student: In a way, there's not that much of a conflict with the law of nature. In the chapter on punishment, it was very clearly said that if it is expedient[69] to let something go, then there is no reason for you to punish. So what the law of nations comes down to is some sort of an agreement that everyone will forego his right to punish violations of the natural law.

Student: My problem is that there seems to be a confusion about what the law of nature is in regard to the prosecution of war. We do know the law of nations in this area, so this seems the only expedient thing to do, is to follow the law of nations.

LS: In other words, because of the heat of battle, you don't have the cold blood to distinguish—you simply close your eyes.

Student: The first paragraph in chapter 10 is very helpful. Book 3, chapter 10.

Reader:

> I must retrace my steps, and must deprive those who wage war of merely all the privileges which I seem to grant,[xcv] yet did not grant to them. For when I first set out to explain this part of the law of nations I bore witness that many things are said to be "lawful" or "permissible" for the reason that they are dealt with impunity,[xcvi] in part also because coactive tribunals lend to them their authority; things which, nevertheless, either deviate from the rule of right (whether this has its basis in law strictly so called, or in the admonitions of other virtues), or at any rate may be omitted on higher grounds and with greater praise among good men.[xcvii]

[xcv] In original, not "merely all the privileges"; "nearly all the privileges."
[xcvi] In original, not "dealt with impunity"; "done with impunity."
[xcvii] *JBP*, 3.10.1.1.

LS: This is the passage you mean, and what it shows is the irrelevancy of the concept of right strictly understood for the problem at hand, the irrelevance of the distinction between right strictly understood and right broadly understood for the question at hand.

Student: But it also shows that he isn't granting everything that *ius gentium* grants. What he is withdrawing now are all of these atrocities which were apparently sanctioned.

LS: But what does he do by qualifying the *ius gentium* which sanctions these things? Would it not be better to repeat with great force what human decency demands, and then let the individual commander of soldiers[70] [decide] how decent he is or believes he can afford to be? You must admit that if the right of law permits the killing and sacking of towns, if you say that, it is bound to have some effects. But not a legal effect. Let's say someone has been robbed of his property and his parents have been killed and his wife has been raped, there is no possibility to go the Hague and say I want . . . .

Student: But there is a standard: there may not be an executioner.

Student: He is trying to cut down on reprisals by saying that the *ius gentium* sanctioned the things that went on in the Thirty Years War. He is trying to keep other nations, say, the Swedes, from mixing in on the grounds—say, the Imperial troops did these heinous things, and they are against natural law in northern Germany but *ius gentium* sanctioned it, therefore it is not right to come in and burn out the rest of Germany.[xcviii]

LS: I think the question is very important, whether his idea—by lowering the standards to draw an effective line—is a sound beginning. That is my question. What will bring about some line is surely fear of reprisals, but this does not necessarily require the[71] [legalization of injustice].

Student: Rather than looking for a line, isn't there the clear implication again that he is concerned with stability? Because with this almost laughable concern with poison, the only persons who benefit from this are the kings, and it certainly can't be explained by passion, because passion might encourage one king to have another king[72] [poisoned]. It would seem that by preserving kings, you are preserving a kind of authority even within war, and it would seem again that there is some kind of national stability.

LS: I don't believe that's to the point. He simply qualifies that. Since it is a fact that it is a rule—say, killing a king in battle—killing a king in battle is of course perfectly okay, but poisoning is mean. The feeling which is—and then he says, the feeling of everyone I talk to, that this is the law. Now if I look more closely, I see it cannot possibly be of natural right because if I have the right to kill, I have the right to kill by any useful

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[xcviii] The Thirty Years' War ravaged central Europe from 1618 to 1648. Motivated by animosity between Catholic and Protestant sovereigns, it saw some of the most brutal fighting ever witnessed in Europe. The Holy Roman Empire (and others) fought on the Catholic side, while Sweden (and others) fought on the Protestant side. Grotius' *Law of War and Peace* was published in 1625, in the midst of this war.

means. Poison may be more helpful in certain situations. Certain habits and customs have grown up in the Western world and they draw a line somewhere. Grotius, as it were, is grateful for every line drawn somewhere because it is at least some desire for some law and limit. One can understand that. Then he further raises the question: Is this prescribed by natural right, *i.e*., is it intrinsically sound? Or is it not intrinsically sound, like this poisoning, but has nevertheless a kind of reasoning because the kings have this interest in the prohibition against poison?

Student: He is not only codifying it, he's strengthening it by pointing out that this is to the advantage of kings. He's hoping to have a more convincing argument to the kings to refrain from it. I think there are a few other places in which he does this, where he tries to strengthen the law of nations, not on the basis of any natural law teaching or any higher virtue, but on the basis of the calculation of the individual problem, and this is one of the examples.

LS: But is not the fundamental calculation this: I am glad about any limitation to savagery which people acknowledge.

Student: Well, Grotius is— but he's making it clear to the king that it is not in his interest to do it this way. He misses a very different argument, and one would think it would be effective with a king, and that is simply to tell him that there is something petty about poisoning your enemy. So he says it is to your advantage not to poison your enemy and you wouldn't want this sort of thing going on, and in that way he hopes to enforce the civilizing of[73] [war].

LS: All right. You can state it this way, and in fact you state more completely what I meant. Any limitation, however arbitrary, of savagery is civilizing, and from that point of view it doesn't make any difference what has found that kind of recognition in custom, say, of the European nations. This is not a very profound reason and not a clear reason, because one would wish to have some greater clarity where to draw the line.

In paragraph 16 [of chapter 4] in the first section, he speaks I think for the first time of . . . .

Reader: "this also is contrary to the law of nations,[xcix] not indeed of all nations, but of European nations, and of such others as attain to the higher standard of Europe."[c]

LS: In other words, there is also a European *ius gentium*. Now in retrospect, historically, one can of course say that the law of nations of the seventeenth and eighteenth centuries was European. America is naturally included in Europe.[74] [European tradition held] that[75] [combatants] must declare war, probably going back to medieval notions about chivalry, the gauntlet. This is only in passing. Assassination of enemies is all right from the point of view of both natural right and *ius gentium*. Paragraph 18, section 2, the beginning.

[xcix] "But this also is contrary" is in the translation.

[c] *JBP*, 3.4.16.2.

Reader: "Not merely by the law of nature but also by the law of nations, as we have said above, it is in fact permissible to kill an enemy in any place whatsoever; and it does not matter how many there are who do the deed, or who suffer."[ci]

LS: Read the beginning of section 3.

Reader:

> No one ought to be influenced by the fact that when persons who have made such attempts are caught they are usually subject to defying tortures.[cii] This result does not follow because they have violated the law of nations, but because, by that same law of nations, anything is permissible against an enemy.[ciii]

LS: So in other words, there are certain difficulties. The beginning of section 4.

Reader:

> But a different point of view must be adopted in regard to those assassins who act treacherously. Not only do they themselves act in a manner inconsistent with the law of nations, but this holds true also of those who employ their services. And yet, in other things those who avail themselves of the aid of bad men against an enemy are thought to sin before God, but not before men; that is, they are thought not to commit wrong against the law of nations, because in such cases
>
> Custom has brought law beneath its sway[civ]—

LS: Now turn to the beginning of section 5 and then section 6.

Reader:

> The reason why in this matter men have reached a conclusion different from that adopted in other cases is the same that we advanced above with regard to the use of poison. It has in view the purpose to prevent the dangers of persons of particular enemies from becoming accessible.[cv]

LS: Turn to the next and last section.

Reader:

> In a public war, therefore, or among those who have the right to declare a public war, the practice of this consideration is not permissible;[cvi]

[ci] *JBP*, 3.4.18.2.
[cii] In original, not "subject to defying tortures"; "subjected to refined tortures."
[ciii] In original, not "against an enemy"; "as against an enemy." *JBP*, 3.4.18.3.
[civ] Grotius follows this quotation (from flush left) with the words: "and 'to deceive,' as Pliny says, 'in the light of the practices of the age, is prudence.'" *JBP*, 3.4.18.4.
[cv] In original, not "of persons of particular enemies from becoming accessible"; "to persons of particular eminence from becoming excessive." *JBP*, 3.4.18.5.
[cvi] In original, not "of this consideration"; "under consideration."

> however, apart from a public war, by the same law of nations it is held to be permissible. Accordingly, Tacitus does not admit that a plot of this sort laid against the renegade Honascus was degrading.[cvii] Curtius says that the treachery of Spitamenes would seem less hateful[cviii] since no one thought anything wicked that would count against Bessus, who is king.[cix] So, too, treachery toward robbers and pirates is not indeed blameless, but goes unpunished among nations by reason of hatred against those against whom it is practiced.[cx]

LS: So that is a special case of treachery. Now the last section, prohibition against rape, is against the right of nations, but not all, only of the better ones, the more civilized ones. It is of course a prohibition against the right of nature.[cxi]

A few words about the next and short chapter. Both the law of nature and *ius gentium* permit of course the destruction of enemy property, and I suppose[76] [not] only that which takes place during bombardment, as long as the fighting is going on, I think. And even of sacred things, which means both temples and burial places.

Student: Natural right would just put a restriction on it; it couldn't become an end in itself. Natural right would say, is this necessary in order to wage the war; well, of course.

LS:[cxii] There is in paragraph 2, the beginning of section 4—

Reader:

> Nevertheless this is true, that if a divinity is believed to reside in an image it is unlawful that the image shall be defiled or destroyed by those who share such belief. On the belief that such an assumption is held,[cxiii] those who have committed acts of this character are sometimes accused of impiety or of contravention of the law of nations. The case is different if the enemy do not hold the same view; so the Jews were not only permitted but even enjoined to destroy the idols of the Gentiles.[cxiv]

LS: This is somehow beyond the competence of natural right, because natural right doesn't draw this line clearly.

[cvii] In original, not "Honascus"; "Gannascus."
[cviii] In original, not "would seem less hateful"; "could seem less hateful."
[cix] In original, not "that would count against Bessus, who is king"; "that was done against Bessus, who slew his king." The names "Spitamenes" and "Bessus" are marked inaudible in the original transcript.
[cx] In original, not "by reason of hatred against"; "by reason of hatred of." *JBP*, 3.4.18.6.
[cxi] *JBP*, 3.4.19.
[cxii] Strauss is not here identified as the speaker in the original transcript.
[cxiii] In original, not "on the belief that such an assumption is held"; "on the assumption that such a belief is held."
[cxiv] *JBP*, 3.5.2.4.

I think we will take up next time this broader question which is indicated by chapter 3, section 15—no, chapter 4, paragraph 15, section 1: this relation of right of nature and *ius gentium*. I sense a great difficulty here which is akin to that simple distinction between law and morality. That practically such a distinction has always been made is clear, but whether it is possible to say in a universally valid manner which things can and cannot belong to law, this I doubt. Similarly, here can you draw a line, because of the manifest impossibility to have strict amounts of morality enforced—and is there a principle which allows you to draw the line between that part of the moral law which is likely to be obeyed by the majority of the people and that which is not? I believe something of this kind is the interest of these modern thinkers:[77] the simple and classical [rights]—life, liberty, and property—[78] are to be protected by the law, and that is that. Whenever you go beyond that minimum, then the government becomes paternalistic. The great liberal fight for the freedom of men, for the private sphere, is of course secondary. I believe today that the line would be drawn differently, say,[79] [from] the way in which it was drawn by Locke, but the concern is still the same. This is a very important question. The practical necessity of drawing the line is obvious, but can there be a theoretically and universally valid distinction between these two? I mean there are things which cannot be enforced by law. Purity of intention—surely that cannot be enforced. All the things which are now under discussion between the two camps in this country, whether it is obscenity, or morality as it is more generally called, or freedom of speech. Where does treachery or disloyalty begin? If you think [about] any question, you will come back to this question: What are[80] [proper limits] of secular legislation? The problem came to the fore as a theoretical question in[81] modern[82] [centuries].

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[1] Deleted “paragraph five in.”
[2] Deleted “first.”
[3] Deleted “deduces.”
[4] Deleted “[inaudible].”
[5] Deleted “things.”
[6] Deleted “a.”
[7] Deleted “because.”
[8] Deleted “it, [inaudible].”
[9] Deleted “37.”
[10] Deleted “blind [inaudible].”
[11] Deleted “the.”
[12] Deleted “them.”
[13] Deleted “is.”
[14] Deleted “citizens.”
[15] Deleted “[inaudible].”
[16] Deleted “a.”
[17] Deleted “he.”
[18] Deleted “he.”
[19] Deleted “[inaudible].”
[20] Deleted “it.”
[21] Deleted “of.”
[22] Deleted “the.”
[23] Deleted “the.”
[24] Deleted “the.”
[25] Deleted “by.”
[26] Deleted “[inaudible].”
[27] Deleted “[inaudible].”

[28] Deleted “enough.”
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[30] Deleted “well.”
[31] Deleted “[inaudible].”
[32] Deleted “[inaudible].”
[33] Deleted “premium.”
[34] Deleted “simplicates the.”
[35] Deleted “He.”
[36] Deleted “his.”
[37] Deleted “[inaudible].”
[38] Deleted “than.”
[39] Deleted “catastrophe.”
[40] Deleted “forms.”
[41] Deleted “that.”
[42] Deleted “sees.”
[43] Deleted “commoners.”
[44] Deleted “but.”
[45] Deleted “Greek history.”
[46] Deleted “of.”
[47] Deleted “[inaudible].”
[48] Deleted “[inaudible].”
[49] Deleted “[inaudible].”
[50] Deleted “this meaning.”
[51] Deleted “he needs it completely.”
[52] Deleted “this.”
[53] Deleted “now.”
[54] Deleted “but.”
[55] Deleted “[inaudible].”
[56] Deleted “go inside between.”
[57] Deleted “closed.”
[58] Deleted “Nikalesos.”
[59] Deleted “second.”
[60] Deleted “[inaudible].”
[61] Deleted “[inaudible].”
[62] Deleted “9.”
[63] Deleted “It is.”
[64] Deleted “with.”
[65] Deleted “nations.”
[66] Deleted “that means.”
[67] Deleted “[inaudible].”
[68] Deleted “[inaudible].”
[69] Deleted “not.”
[70] Deleted “to see.”
[71] Deleted “qualification.”
[72] Deleted “[inaudible].”
[73] Deleted “that.”
[74] Deleted “[inaudible] has.”
[75] Deleted “they.”
[76] Deleted “on.”
[77] Deleted “and.”
[78] Deleted “and they.”
[79] Deleted “in.”
[80] Deleted “[inaudible].”
[81] Deleted “the.”
[82] Deleted “century.”

Session 12: November 12, 1964

Leo Strauss: I can't help thinking about Rousseau's statement about the right of war, the first Book of the *Social Contract*, that a strict line is drawn.[i] A war is a war between the armies, and the civilian population has to be spared. The second a soldier becomes a prisoner, he ceases to be a soldier. There is no doubt that Rousseau's views are much closer to ours and are more humane. You said rightly[ii] that according to Grotius slavery is not natural, but only derivative from *ius gentium*, from human convention of one kind or another.

Now in order to understand Grotius' problem, I think we begin as I started to last time from a very general schema, which I will present pictorially. We have here a flooring and here a ceiling. The ceiling is[1] [the] traditional teaching according to which what is by nature right comprises all demands of human excellence without any ifs and buts. The flooring is represented by Machiavelli according to which the[2] [basis] of policy is only calculation. There is something still lower, a bestial kind of warfare, where people are not even concerned with their self-interest but only killing and ruining. So there is something beneath this flooring. Now somewhere between the flooring and the ceiling is the place of law which never goes as high as the full demands of human excellence, but which goes beyond mere calculation. By law I mean here of course only human law. Now if we follow the modern usage, we may call the ceiling morality, and then the question arises: What is the principle underlying the distinction between law and morality?

Now Grotius suggests a principle by speaking of justice strictly understood, and justice strictly understood means what affects the relations among men as distinguished from the improvement of individuals—those actions by which we affect other people. Now this distinction is somehow based, as Grotius knew, of course, on the Aristotelian distinction between the two kinds of justice. The first is universal justice, and this is based on the fact that the law as Aristotle understands it intends to make the citizens good and doers of noble deeds, whereas the other kind, particular justice, is one special virtue, one special form of excellence. Universal justice deals in a way with all excellence, and this particular justice has to do indeed with the relations among men, or with certain relations among men. For example, if you take a virtue like[3] [charity], this of course has to do with the relations among men, but the relations in free association, the need for conversation and so on, whereas justice has to do with other kinds of relations which are here not defined by Aristotle, but you can perhaps figure out.[iii] So on this very level we see already a crucial difference between Grotius and Aristotle insofar as Grotius drops distributive justice from justice strictly understood. Justice strictly understood is only commutative justice, and commutative justice in both parts, voluntary transactions, exchange of goods and services, and involuntary transactions, crime and punishment. But distributive justice has no place in justice narrowly understood.

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[i] Rousseau, *On the Social Contract*, Bk. 1, chap. 4.

[ii] Strauss responds to a student's paper, read at the beginning of the session. The reading was not recorded.

[iii] Aristotle's discussion of justice is in the *Nicomachean Ethics*, Book V.

Now the second point: from the classical point of view one may call the ceiling what is right by nature, and after Aristotle the common term was natural law, in Cicero and later, and of course in Thomas Aquinas. Natural law would as such comprise both universal and particular justice in the Aristotelian sense.

Now I disregard certain subtleties which are on the surface very important but which we can neglect in our present context. According to Aristotle, what is by nature right is changeable.[iv] That is a clear statement; the interpretation is very difficult. As the statement is understood, all right is changeable, and natural right in particular. According to Plato,[4] natural right must be diluted in order to become effective, which is also a principle of change. According to Thomas Aquinas—we have read the passage a short while ago—only the first principles of natural law are unchangeable.[v] Grotius however teaches that natural law is simply unchangeable. That is the reason why natural law in contradistinction to human or divine law can be reduced to an art. We have seen that. What Grotius began leads then later on in the seventeenth and eighteenth centuries to codes of natural law. We don't have such a code here; we have a lot of *ius gentium* and also of divine law, but say around 1700 this would have no longer been found bearable. You would have to present what we call international law on a strictly natural law basis. This is what men like Vattel, for example, have tried to do. But the same notion or fundamentally the same notion is underlying such a work,[5] [though] it seems an entirely different [type of] work, as Spinoza's *Ethics*, the full title being *Ethics Demonstrated in a Geometrical Manner*. You could never treat a body of law which is partly based on actions of will, human or divine, in a geometrical manner. Grotius has something to do with this tendency—to bring natural law, as Grotius calls it, into[6] [scientific form], presenting it in geometrical form. This tendency is older than Grotius. It began in the sixteenth century. Some German Protestants made that proposal, but they didn't go beyond that. I know this from an older book written over one hundred years ago by Kaltenborn, in German, *The Precursors* of *Hugo Grotius*.[vi]

Now the next step we have to take—natural right is to be unchangeable, but natural right is of course, as I indicated before, limited to right strictly understood, *i.e*., it [does not include the] demands of the other virtues and it excludes distributive justice. Still, the basis of right strictly understood is man's rational and social nature. And this is where Grotius is entirely old-fashioned. Yet there is a linkup early in the work between right strictly understood and the beginnings of nature, the *prima naturae* as Cicero calls it, in contradistinction to the end of man. There is a connection between right strictly understood and the elementary desires or wants which man has from the moment of his birth, and among these things is self-preservation,[7] [playing] of course[8] a crucial role.

Now let us look at two passages here. Book 2, chapter 1, paragraph 4.

[iv] See Aristotle, *Nicomachean Ethics* V.7. This passage was also discussed in session 10.
[v] *ST* 1-2ae, q94 a5. This passage was discussed in session 10.
[vi] Carl von Kaltenborn, *Die Vorlaüfer des Hugo Grotius auf dem Gebiete des Jus Naturae et Gentium* (Frankfurt: Antiquariat Sauer & Auvermann, 1965 [first published 1848]). The "Precursors" are Johannes Oldendorp, Nicolaus Hemming, and Benedict Winkler.

Reader:

War in defense of life is permissible only against an actual assailant

> It is a disputed question whether innocent persons can be cut down or trampled upon when by getting in the way they hinder the defense or flight by which alone death can be averted. That this is permissible, is maintained even by some theologians.

LS: Because theologians are as a rule more strict than the lawyers.

Reader: "And certainly, if we look to nature alone, in nature there is much less regard for society than concern of the preservation of the individual."[vii]

LS: And since natural law deals with what nature is concerned [with], it would seem that self-preservation has here a more important status. In the same Book, chapter 15, paragraph 5.

Reader:

> But it is necessary for us to make the classification of treaties with greater painstaking.[viii] Furthermore, we shall say that some treaties establish the same rights as the law of nature,[ix] while others add something thereto. Treaties of the first class not only are wont to be made between enemies who cease from war, but formerly also they were often made, and were in some degree necessary, as between those who previously had made no compacts.[x]
>
> Hence arose the rule of the law of nature, that by nature there is a kind of relationship between men—

LS: Kinship.

Reader:

> and therefore it is an impious crime that one should be injured by another. Though this rule was enforced in olden time before the Flood,[xi] yet some time after the Flood it was effaced again by evil customs, so that it was considered lawful to rob and plunder strangers without declaration of war.[xii]

LS: This has this implication: the right of nature as being taught by Grotius belongs to some extent to an era in which man's natural sociality was corrupted, but in which the

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[vii] *JBP*, 2.1.4.1.
[viii] In original, not "the classification of treaties"; "a classification."
[ix] In original, not "Furthermore." "First, then."
[x] In original, not "no compacts"; "no compacts with each other."
[xi] In original, not "enforced in olden time"; "in force in olden time."
[xii] In original, not "to rob and plunder"; "to rob and to plunder." *JBP*, 2.15.5.1.

desire for self-preservation was still in vigor. These passages[9] show that there is a very easy way from Grotius' natural law, which is fundamentally traditional, to Hobbes's natural law, where the starting point is self-preservation pure and simple, without any qualification.

Now the fourth item I wanted to bring up is this. Grotius teaches with the tradition and even with his successors that natural law is in need of being supplemented by volitional law. Nature is used in contradistinction to volition. Nature is not based on volition as such, and the volitional law can be human or divine.

In chapter 3 of the same Book, paragraph 6, we read "*humana jura multa constituere possunt praeter naturam: contra naturam nihil*—"[xiii] human[10] [laws] may establish many things outside of nature, [but nothing] against nature.[11] Now what does this mean? Natural law is truly unchangeable; it cannot be changed by human or divine will, but it can be supplemented. For instance, natural right does not forbid polygamy or the distinction between legitimate and illegitimate children. But human and divine law may very well forbid polygamy, and may very well give the legitimate children a higher status regarding inheritance or what not than the illegitimate or unnatural children. This view regarding the status of legitimate or illegitimate children can be understood as follows. The preference which is given to legitimate children by law is unfair because it contradicts natural law, natural equity. According to Gronovius, the commentator whom I use, this is implied in Grotius' statement. In other words, Gronovius was not a Rousseauean or something corrupt. He was a very harmless professor at a Dutch or German university, and he had a belief that Grotius hints at: that illegitimate children should have the same legal status as legitimate children. This is only to give some inkling of the practical implications of these discussions.

Another example: natural right permits treaties with irreligious and impious nations. Book 2, chapter 15, paragraph 9. But again, this right must be used only in extreme situations. We know also that oaths, legations, [and] burials, are institutions of *ius gentium*, not of natural right. Something has been added to natural right without natural right being changed.

The impression we get from these occasions I have mentioned is this. Right of nature is a kind of flooring, [while there are moral levels] higher than this, [and even] much higher than this, and the *ius gentium* and the good human laws are a step in the direction of the ceiling. Monogamy is a more noble institution than polygamy, but natural right as such does not establish monogamy. This is one side of the story. Yet we also know, if from no other source than what we have heard today, the *ius gentium* is also more lax than the natural right. For example, regarding killing in war and pillage and burning down houses and so on, right of nature is rather strict and the *ius gentium* is rather lax. Or to take another example, we can perhaps look at one passage, Book 3, chapter 19, paragraph 5.

Reader:

[xiii] *JBP*, 2.3.6.

> *Or, if an oath has been given, the fact that the promise has been extorted through fear is no obstacle,*[xiv] *although in the case of a break-in*[xv] *such an oath is violated with impunity as far as men are concerned*.[xvi]
>
> There is a further consideration that a person who has made a promise under the compulsion of an unjust fear[xvii]—

LS: *I.e*., a man frightened him who had no right to frighten him.

Reader:

> can be obligated if the sanction of an oath has been added. For, as we have said elsewhere, man is thereby bound not only to man but also to God,[xviii] and in relation to Him fear makes no exception. Nevertheless it is true that the heir of the promisor is not held by such a bond alone, because, according to the primitive law of ownership, those things which belong in the commercial relations of life pass to the heir,[xix] but these do not include a right sought from God, as such.

LS: As is implied by an oath.

Reader: "This, again, must be repeated from an earlier statement, that if anyone violates a sworn or unsworn pledge for any reason[xx] he will not on that account be liable to punishment among other nations. For because of the hatred of brigands the nations have decided to overlook illegal acts[xxi]—"

LS: You see, that is *ius gentium*, because they hate these pirates, for very intelligible reasons, yet this is not what natural right says; otherwise the agreement, the convention among the nations regarding the treatment of pirates, would have been unnecessary. It only confirms this point which we know anyway, that the *ius gentium* is more lax in some respects than the right of nature.

According to natural right, the offspring of slaves are not slaves, but according to *ius gentium* they are. The *ius gentium*, in contradistinction to natural right, regards all formally correct wars as just wars. Every war began by a government de facto, by declaration of war and the other niceties, it is regarded as a just war. That is the institution of *ius gentium*, as natural right denies that.

[xiv] In original, not "is no obstacle"; "presents no obstacle."
[xv] In original, not "break-in"; "brigand."
[xvi] In original, not "as far as men are concerned"; "so far as men are concerned."
[xvii] In original, not "a further consideration"; "the further consideration."
[xviii] In original, not "man is thereby bound"; "a man is thereby bound."
[xix] In original, not "in the commercial relations"; "to the commercial relations."
[xx] In original, not "for any reason"; "given to a brigand."
[xxi] Kelsey has "to overlook illegal actions committed against them." *JBP*, 3.19.5.1.

In Book 2, chapter 8, paragraph 3 we read "the civil law" (the civil law is human law and there is fundamentally no difference here from *ius gentium*) "the civil law[12] [is capable] of making many things invalid which would be obligatory by nature" (meaning according to natural law).[xxii]

And now let us read again this key passage which we read last time, Book 3, chapter 4, paragraph 15, section 1.

Reader: "However, just as the law of nations, through that form of permission that we have now explained, gives many things which are forbidden by the law of nature, so it forbids certain things which are permissible by the law of nature."[xxiii]

LS: Does this not in effect mean[13] that the *ius gentium* is on the one hand more strict than natural law, and on the other hand more lax? Does this not in effect mean that the natural law is changeable? Either under the pressure of necessity—we came across that phrase last time and we cannot know in advance where necessity might arise and raise its ugly head, and therefore make natural law invalid—or for reasons of equity—in this case natural right itself is changed. Natural equity tells us to deviate from both.

The question is: Could one not have reached the result which Grotius tried to reach to get the recognition of certain limitations on warfare either by sticking to traditional natural law and simply saying: Well, what can you do when you are confronted with people who flaunt every right but are at least willing to recognize certain manners, certain customs, which are generally recognized? Or else on a Machiavellian basis, namely, utilitarian recommendation of a broad-minded, not petty imperialism which would lead to exactly the same result, and simply say: Well, don't kill unless it is absolutely necessary? Many imperialists have acted exactly on this principle. We have a beautiful illustration by Thucydides, when he confronts the Athenians with[14] [the Mytilenean rebellion] and the Athenians tried—well, the Athenians were really imperialists, while the Spartans were not (or at least not visibly, as they had done their empire-building centuries before). The Athenians, with some difficulty, although in the end[15] [acted] reasonably and decently, and the Spartans were wholly unable to behave that way. But the difference was that the Athenians were far more far-sighted at least in this respect: the Athenians didn't see what good would come out from thoughtless killing merely because they have the right to kill.[xxiv]

That is my question. I repeat it. Could one not have reached the result which[16] [Grotius] tried to reach, and which was surely humane and decent, to get some limitation on the bestialities of war by sticking to the traditional natural law and simply say[ing]: What I propose is a very poor approximation to true humanity, and that is the maximum which is

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[xxii] Grotius makes statements similar to this, but this precise statement does not appear in the passage identified in the transcript.

[xxiii] In original, not "gives many things"; "permits many things." *JBP*, 3.4.15.1.

[xxiv] This incident is related in Thucydides' *History*, Book III, culminating in the famous debate between Cleon and Diodotus, III.37-49.

likely to be accepted by warring people today? Or, on a Machiavellian basis, and say: Look at the limitations which the Romans had?

Student: Wouldn't you say that he did the former, part way? He stuck to the natural right tradition, and then instead of throwing up his hands and saying: Oh, this doesn't go the way it should—all right, he recognized how things do go on certain rules, introduced a new principle of permissibility, and recognized that[17] [violations of the law happen] and cannot be punished, but kept that tension and stuck to his natural right because it was [still] blameable, but he at least was able[18] to develop an international law. If he threw up his hands, he would in effect say: Well, there's no use in constructing international law, it's too far from reality. In other words, I think he stuck to the tradition . . . .

LS: Well, I believe that you say only in somewhat different terms what I proposed. Surely one shouldn't throw up one's hands and should do something the best one can, but I'm concerned more than you are with the theoretical danger, the danger of too [little] theoretical clarity. The way in which he does it is also confusing, insofar as he creates the impression that there is no law, that there are only recommendations. That's the difficulty here.

Student: But there is a certain necessity in saying that whatever compacts are made during a war are lawful, because otherwise you always do run the risk of the unjust conquest becoming the basis for a future war? If you simply say: Well, a nation acts unjustly and takes what isn't rightly conquered—

LS: But on the other hand, the injustice is felt by the conquered people, and simply to condemn in advance the desire for liberation is not evidently wise and just. In addition, it didn't [always] bring[19] about [peace]. If a country lost a certain territory,[20] [often an][21] [irredentist movement] started, if they could do it. If they were too weak, then they could gradually accept the conqueror, and if they were tolerably decently treated, they might even forget that they belonged originally to another society.

One effect was—not of Grotius, but of later teaching like Rousseau—that the treatment of prisoners and civilians improved in the late eighteenth and nineteenth centuries and to some extent during the First World War. In other words, if the modern centuries for a certain period, say, 200 years, have seen a considerable humanization of war, and this had something to do with the emergence of modern natural law, and Grotius prepared that (although he did very little compared to some people), we owe him gratitude, surely. But we would also have to go into the question of how come this was possible? Was this due entirely to the emergence of modern natural law, or were there not other factors involved which made—for example, the pure technology of war changed; it is not a negligible factor. In other words, this humanization, say, between 1750 and perhaps the First World War—but technology of course is an ambiguous thing, because technology also leads to greater brutality: think of poison gas, to say nothing of more recent inventions where the distinction between the civilian and non-civilian population is meaningless. In other words, what were the conditions which made it possible that some mitigation of warfare was brought about? But we have to add immediately: only within certain areas. The

Japanese in fact never recognized[22] [these legal limitations on war], at least not in the Second World War. They regarded this as a war to the finish.

Student: In light of the more practical benefits from Grotius' *ius gentium*, I think there are theoretical benefits in his keeping the natural right and saying that some things are permissible and some are not, because you can then clearly make a judgment about justice and injustice, whereas later you can't say anything more than the sovereign has the right to determine—

LS: Not quite. That may be so in Hobbes, but surely not in Vattel and Rousseau, nor in Locke. The distinction between[23] [combatants and non-combatants among] an enemy people was understood to be a natural law distinction, and that is crucial. But in the moment you have the military technique and technology changes, the distinction becomes meaningless. What does it mean, a bombing attack on an enemy city? Most of the victims will of course be civilians, but on the other hand you could say they are no longer true civilians: many of them are working in the armament industry, and to work in the armament factory is almost the same as being a soldier. I think one would have to go into an analysis which we cannot do here, why this mitigation of warfare was effective, say, for[24] [a hundred years].

There are certain delusions. For example, it is often said by critics of modern democracy: Look how gentle and nice these wars in the eighteenth century were, when gentlemen, members of the nobility, were in command. And you have only to read a concrete analysis of any battle—the Battle of Blenheim in Churchill's memoir [of Marlborough]—to see what a terrible battle that was. The cannon did not have at that time the [same] power [as the munitions] in the First World War, but it was bad enough. There are some people who make a professional study of these kinds of things. Knowing that would be very helpful. We are today at the other end of the thing because international law is, I believe, the least safe support for any man today who wishes to hope.

Student: Do you conclude then that for Grotius the natural law is unchangeable?

LS: That is his thesis. That is very important, because[25] [that] alone makes it possible to reduce natural law to an art, which is one of the two major aims in the whole book, the one being to codify the law of war and peace, and the other to reduce natural law to an art.

Student: The reason I ask is that [inaudible] refuses Grotius the fact of making the law of nature changeable.

LS: I would like to know what he means by it because [inaudible] is not one of the brightest stars in the sky. But still, he may be right in a given case.

Student: About communal property . . . .

LS: Oh, contracts. I remember that. That is a criticism not only of Grotius but of the whole concept here. And today I say now we are at the other end. The trust in international law is at a very low point, and the hope which people have today is based entirely on technological considerations. A thermonuclear war is insane from a Machiavellian point of view. You hurt yourself more [than] or at least as much as your enemy. This is an entirely different order of reasoning. The question of right is completely left out here.

Student: There seems to be an important element of Grotius in present international law, in the sense that modern international laws have become entirely almost a matter of agreement. There is almost nothing natural . . . .

LS: I see, but . . . sure. That is one of the major agreements to entry into a law school or social science school: there ain't no natural right. That is not a peculiarity of international law. Excuse me if I use this colloquial expression, but I think it is perfectly on the level, at least of this thesis in many, many cases . . . .

Student: The thesis that was presented—that perhaps today's understanding of a kind of mitigation is more easily traceable to Rousseau . . . .

LS: I would agree to that. The principle is much clearer but the practical question would be: Grotius should have given his own principles, should have made a distinction between civilians and[26] [soldiers], and he didn't make it so he can justly be blamed? But Rousseau, on the other hand, cannot be blamed for not having seen a situation in which this distinction becomes inapplicable because of the progress of military technology. If Rousseau had been a promoter of progress in military technology, then he would be blameworthy, but as a matter of fact he was not.

Student: My thought is that mitigation is perhaps associated with something other than law primarily, and if that is the case, is Grotius apt to understanding the mitigation?

LS: That was a long sentence. Can you break it up?

Student: If it is true that Rousseau somehow[27] [brought about] mitigation of conduct, and Rousseau's mitigating is not a legal one, not the product of law . . . .

LS: But it is natural law.

Student: Not a formalized teaching, whereas Grotius produced a formalized codification and did not seem to lead to such a mitigation. If that's true, are we to look to mitigation from a kind of codification of law? In other words, is Grotius the path to understanding mitigation?

LS: If I understand you correctly, do you mean to say are not these few[28] [remarks] in Rousseau much more effective in clarifying the situation than 500 pages of Grotius with long footnotes? Is that what you mean?

Student: Yes.

LS: Yes. Yes, technicalities can easily be elaborated by technicians, but the broad principles are [not] made very clear. We see today immediately the difficulty which Rousseau's more humane teaching proposed. I repeat: Is it possible to wage war by making the distinction between fighting and non-fighting populations? Surely babies are not fighting, everyone knows that. But babies are never alone, they are near their mothers. Disregarding entirely now the bombs—you cannot distinguish between babies and non-babies, but the mothers may very well work in armament factories.

Student: I think the thing that confuses us is that you raised the question of mitigating conduct in the context of understanding the importance of Grotius, and it would seem that to take your answer that Rousseau is primarily responsible, something in Rousseau is primarily responsible for this, and then we are near your original raising [of] the question in the context of Grotius—this would only suggest that he didn't make much of a contribution.

LS: By conceiving the notion of writing a book dealing with the whole right of war and peace, however inadequately carried through, was a step in that direction, a step which must not be[29] [under]estimated.

Student: What troubles me is that perhaps there's a kind of warm-heartedness of some kind associated with Rousseau's teaching that may be more striking and more effective than a formal process of codification.

LS: Rousseau can also be very cold and "logical" and this passage in the *Social Contract* is very logical.[xxv] Surely there is a connection between Rousseau's teaching regarding war and his "boosting," if I may say so, the virtues of compassion. There is surely a connection between these things. If you mean that, there's no doubt. But we cannot take this up now.

Student: When [inaudible] says appealing to natural law, then that seems to mean that he's returned to the traditional natural law.

LS: No, Rousseau goes as far on the Hobbean basis, on the modern basis [of the] right of self-preservation, as one can possibly go and thus incidentally brings about a kind of crisis in natural law. But this is not directly visible in the *Social Contract*. The question is simply this: the right of self-preservation should be the sole basis of law, and morality. That is what Hobbes truly meant. Now Hobbes drew only one conclusion, one can say: to guarantee every subject against the nastiness of everybody else. Police and gallows. For Hobbes the question of participation of the subject in government, *i.e.*, republic or democracy, was of no particular interest—what we[30] [today] understand by freedom. The

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[xxv] We are still presumably discussing the passage from *On the Social Contract* (Bk. 1, chap. 4) that Strauss referred to at the beginning of this session. The quotations around "logical" are in the original transcript.

main point was security. And then the successors, in the first place Locke, said we don't see how this follows from the primacy of self-preservation,[31] because your self-preservation may be endangered by a tyrant and his bodyguard much more effectively than by your fellow subjects, fellow citizens. So we should have both things, security and freedom. Therefore, Locke made his constitution which had this peculiarity that the problem becomes solvable if we consider the fact that the right to property is a necessary indication of the right of self-preservation. I am stating [to] you only now some[32] [broad] facts; I do not give you an explanation of how these held together. Rousseau makes it more clear, at least on the surface, than Locke does that our right to self-preservation is endangered if we do not preserve the right to judge of the means of our self-preservation within civil society. That is also a long sentence which we have to break down.

The right to self-preservation includes the means to the right of self-preservation. But then the question arises: Who is the judge of the means? And Hobbes said—and this became crucial for the later development: everyone is the judge. Whether he's a fool or a wise man doesn't make any difference, on these very practical grounds: because a fool has more interest in his self-preservation than a wise man has in[33] [the fool's] self-preservation. So let's be practical—that was a keynote of these men. So the means belongs to the right of self-preservation. And now Hobbes, however, [says that] if everyone remains a judge, then [we have] a war of everybody[34] against everybody, because[35] everything can be a means to self-preservation according to anybody's view,[36] the fools as well as the wise men. The simple *word*: If you replace "means of self-preservation" by "property," or for that matter by "non-property" (the absence of property),[xxvi] you have an idea how practical this question is. Now what Rousseau said more clearly than anyone else is this: this right to the judgment of the means of self-preservation must be preserved within civil society, otherwise you will not have freedom, political freedom. The simple expression for what Rousseau technically calls the right to judge of the means of self-preservation is the right to participate in legislation or, simply expressed, the right to vote. The equivalent to what is in the state of nature the right of self-preservation is in civil society the right of citizenship. This is of course necessarily a republican—even democratic—doctrine, although Rousseau had many qualifications.[37] Devices compared with which gerrymanderings are highly democratic institutions were approved by Rousseau. That's another matter, but the principle is very clear.

Student: Then you would say that through the means of self-preservation that Rousseau seeks, namely, voting, that this[38] [brings] about the necessity for mitigation.

LS: Ideally, if you have a democratic republic, then these are all people like you and me. You know we really don't want to wage war and kill unless it is absolutely necessary, and then we want to have it decent. We're not mercenaries who fight for pay and for the fun of it.

Student: It is kind of building towards a classical morality from—

[xxvi] This might be one way of stating Marxist doctrine.

LS: Sure, but this is a very difficult thing to understand. On its highest stage, which was not reached by Rousseau but[39] [by German] idealism[40] [and especially by] Hegel, there the view prevailed that they had on the Hobb[es]ian basis built up a moral and political doctrine as noble, as "ideal," as[41] [the classics, if not] more. As a simple proof, in the classics there was slavery, and slavery was completely out in these modern doctrines. This is a view which is still held by many people and it is not easy to refute. It is a very difficult and very long question, and Rousseau prepared the German philosophy immediately. There have been Rousseau enthusiasts for some time.

[change of tape]

Reader: "According to the law of nature, by a lawful war we acquire things which are—"

LS: A just war.[xxvii]

Reader: "by a just war we acquire things which are equal to that which,[xxviii] although it was owed to us, and not otherwise obtain,[xxix] or we inflict upon the guilty a loss that does not exceed the equitable measure of punishment, as has been said elsewhere."[xxx]

LS: If I am not mistaken, all [the] quotations here—there is one exception, from Seneca—are biblical, even Old Testament, and Philo of course is a Jew. In this case I do not believe it is quite unintentional, this emphasis, because the Old Testament raises of course the question of conquest, and in a later discussion in Locke this is quite clear, if only by Locke's silence. The key biblical word in Locke's teaching is the passage from Joshua: Let the Lord judge, let the Lord decide. That is Locke's favorite phrase from the Bible: no longer Romans, let every soul be subject to higher powers.[xxxi] But this passage from Joshua, which [in Locke] refers to the relation between a tyrannical government and the subjects—that the only way to decide this issue is war, and then let the Lord be judge—now in Joshua this passage refers not to the relation between subjects and rulers, but to foreign war. If you look up the context in Joshua, you find the law of conquerors there. This is wholly different from Locke's rather mild and qualified right of conquest. So the question was somehow in the air, I believe, and this may explain why the quotations from the Old Testament abound here.[xxxii]

[xxvii] Grotius' term is *bello justo.*
[xxviii] In original, not "are equal to that which"; "are either equal to that which."
[xxix] In original, not "and not otherwise obtain"; "we could not otherwise obtain."
[xxx] In original, not "the equitable measure"; "an equitable measure." *JBP*, 3.6.1.1.
[xxxi] See Locke, *Second Treatise*, §§ 21, 168; cf. Judges 11:27, Romans 13:1.
[xxxii] That is (it seems), Grotius, Locke, and others were attempting to soften the harsh Old Testament teaching.

The *ius gentium* does not require a just war—that is only what natural right requires. [The] *ius gentium* makes the victor the owner of all possessions of the vanquished. Here practically all authorities are pagan, in paragraph 2.[xxxiii]

It is strange that none of the classical philosophers should have been aware of the natural right in this particular matter. I believe the reason is that the classical philosophers were rather satisfied what a virtuous and noble commander of a disciplined army would and could do and, on the other hand, what a non-virtuous and an undisciplined army [would do]. They threw their hands up, and nothing very different could have been done. Paragraph 6.

Reader:

> Consequently, the current statement that goods, when found in ships of the enemy, are to be considered as belonging to the enemy, should not be accepted as if it were a fixed provision of the law of nations, but as indicating a certain presumption. This presumption, however, may be overthrown by valid proofs to the contrary.
>
> In our native country of Holland in the year 1438, war was raging with the Asiatic towns, a decision to that effect was reached at a full session of the Senate, and from that decision the provision passed into the law.[xxxiv]

LS: This throws some light on the Dutch background of Grotius.

The things which the enemy took away from other people do not have to be restored to the original owner, according to the *ius gentium* again. Under natural right they would have to be restored because he remains the owner.

In paragraph 7, section 2, there is a long quotation which you might perhaps read. It is a story from Livy.[xxxv]

Reader:

> "But we consider as our best possessions those which we have taken by conquest of war.[xxxvi] We were not the first to establish this right, nor do we think that it is a law of men rather than of the gods; but we know that all, both Greeks and barbarians, make use of it, and we would not yield to you anything in cowardice, nor abandon what we have won in war. For it

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[xxxiii] *JBP*, 3.6.2.

[xxxiv] Kelsey: "In our native country of Holland formerly, in the year 1438, when war was raging with the Hanseatic towns, a decision to that effect was reached at a full session of the Senate, as I have found, and from that decision the provision passed into a law." *JBP*, 3.6.6.1.

[xxxv] In the next three selections, which happen to be performed in reverse order, Grotius is in fact quoting from Dionysius of Halicarnassus, *Roman Antiquities*.

[xxxvi] In original, not "of war"; "in war."

would be the utmost disgrace if anyone through cowardice and folly should be deprived of what they have won by courage and bravery.’’’[xxxvii]

LS: Read the[42] [previous] one.

Reader:

“We Romans think that with perfect right one may hand down, as his own, to his descendants, whatever he has acquired by courageously wresting it from the enemy . . . .”

“We consider as our fairest and most lawful possessions[xxxviii] those which we have taken by the law of war;[xxxix] and we would not foolishly suffer valor to be forgotten in surrendering these possessions to those that have lost them.[xl] Such possessions we think are not only to be shared in by our citizens who are living, but are also to be left for posterity. If we allow ourselves to be deprived of what we now have, we shall injure ourselves in the same manner as which we injured the enemy.”

LS: All right. Read the last quotation, only one sentence.

Reader: “‘Since we have acquired these things in war, it is a perfectly fair law of acquisition.’’’[xli]

LS: If you read this whole section, it comes extremely close to what is said by the Athenians in the dialogue with the Melians, which some of you surely know.[xlii] The classic statement of naked power politics. And this is *ius gentium*. So we are really very close to that flooring of which I spoke before. In paragraph 11, section 2.

Student: Grotius doesn’t allow a just cause of retaliation, does he? If a war ends, you can’t years later reclaim—

LS: No, that is exactly the point. I suppose under some conditions he would admit it, but generally speaking, he is trying to do away with all long-range recriminations because they would be a new source of war. In other words, one can say he follows the maxim: Better an unjust peace, if not unbearable, than war. Let us read paragraph 11, section 2.

Reader:

Thus, among the Jews and the Lacedaemonians land taken by force was divided by lot. So the Romans either kept captured territory in order to lease it, in some cases leaving a small portion to the original possessor as a mark of honor; or they sold it in parcels, or assigned it to colonists, or

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[xxxvii] In original, not “what they have won”; “what had been won.”
[xxxviii] “We Romans consider” in the translation.
[xxxix] In original, not “which we have taken”; “which we have taken and hold.”
[xl] In original, not “that have lost them”; “who have lost them.”
[xli] In original, not “it is”; “which is.” *JBP*, 3.6.7.2.
[xlii] Thucydides, *History* V.84-116.

> made it subject to taxes. For such disposition of conquered territory there is abundant evidence in the laws and histories, and the treatises of the land-surveyors.[xliii]

LS: You see here the difference between the Romans on the one hand, and the Hebrews and Spartans on the other. The Romans, at least some,[43] left some land to the conquered, and I believe this has to be taken into connection with paragraph 1 and the fact that there the authorities are all biblical. Of course, Grotius would always have the way out that[44] Old Testament provisions, to the extent that they are based on law, cannot be measured by the standards of human law because God is the owner of everything. Therefore, there would be no theological difficulty. But one can never know in these writings of the seventeenth century how far they would accept this kind of theological reasoning.

In paragraph 13, which is very short, there is a phrase which has to do with the state of nature.

Reader: "But our statement, that by the law of nations things movable or capable of motion are directly acquired by individuals, must be understood as applicable to the law of nations as unmodified by any municipal law covering the matter."[xliv]

LS: Literally translated: that this belongs to right of nations before, prior to, any civil law regarding the same matter.[xlv] Now this does not mean here, of course, that the *ius gentium* precedes the civil law. On the contrary, the *ius gentium* can come into being only after there are already societies, after there are already civil laws. This is important, lest one would take phrases [improperly]. Grotius would say that the *ius naturae*, natural right prior to civil law, includes by itself an assertion of a state of nature preceding the state of nature. This conclusion is not [in]valid. I think this is shown by this example.

In the next chapter right at the beginning, we find a phrase which is more important regarding this subject.

Reader: "By nature at any rate, that is, apart from the human act, or in the primitive condition of nature—"

LS: In the primeval state of nature.[xlvi] Here we have it.

Reader: "no human beings are slaves."[xlvii]

LS: Only because of the phrase. So here we have this phrase, "the primeval state of nature." And the[45] [secondary state of nature] is on the other side, prior to any human act,

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[xliii] In original, not "and the treatises"; "and in the treatises." The word land-surveyors is marked inaudible in the original transcript. *JBP*, 3.6.11.2.
[xliv] *JBP*, 3.6.13.
[xlv] The Latin original is "*juris gentium sit ante omnem ea de re legem civilem.*"
[xlvi] The expression is *primaevo naturae statu.*
[xlvii] *JBP*, 3.7.1.1.

human convention. That is so, that is the state of nature—but what is the difference between this and the Hobbean one? It is very obvious and at the same time very subtle.

Student: We're primitive.

LS: Primeval, sure. Hobbes no longer speaks of the primeval state, and the primeval state of nature is the one where there was not yet a human fact, *i.e.,* property. The right of nature in Grotius' sense includes of course rules regarding property, transfer of property, recovery of property, alienation of property, whatever it may be. Property is introduced by men, a human institution, therefore the secondary state of nature is the one in which property is introduced. He must make a distinction between a primeval and a secondary state of nature. In Hobbes, Locke, and Rousseau there is no such distinction. In Hobbes, because property is simply not an institution, there is no natural right in property. In Locke, the state of nature has from the very beginning property, and property belongs to the primeval state because at all times man had to eat, and eating means appropriation and appropriation means making things your property—and even if there would have been some original communism, there would have been already at that time property, according to Locke. So here we have the[46] [difference with] Hobbes in regard to the state of nature.

Student:[47] [What] is that word in Latin?

LS: Primeval, *primaevo naturae status*. The study which someone should make is a history of the state of nature concept prior to Hobbes and of course also prior to Grotius. Here again, it is very hard to do these things in Chicago, where you don't have . . . . In addition, it's a good work for a younger man after knowing what he is looking for, because if he finds millions of passages in which the term state of nature occurs—but where state of nature simply means state of paganism, that is of no interest whatever, but where it would mean a state antedating civil society in which man has certain rights of nature and obligations. This is the closest approximation to it in Grotius, and this is not good enough.

How far does the right of enslavement extend, according to the *ius gentium*? There is a long note to paragraph 1, section 3.

Reader: "In the preceding chapter, you will find much that is applicable also to here,[xlviii] for the reason that writers either combine, or treat identically, captured things and captive men."[xlix]

LS: I'm sorry, because I use at home a much better edition but I cannot possibly bring it to class. It refers to the passage where women are regarded as a matter of course as lawful booty. Paragraph 5, section 1, which explains why these provisions of the *ius gentium* were made.

[xlviii] In original, not "you will find much that is applicable also to here"; "you find much that is applicable also here."
[xlix] *JBP*, 3.7.1.3 (n. 3).

Reader: "'The Greeks refused to restore Hesione to the Trojans, saying that they held her by the law of war.'"[l]

LS: And Grotius accepts that.

Reader:

> All these rights have been introduced by the law of nations with which we are dealing, for no other reason than this: that the captors, mollified by so many advantages, might willingly refrain from recourse to the utmost degree of severity, in accordance with which they could have slain the captives, either immediately or after a delay, as we have said before.[li]

LS: This reasoning, by the way, goes back to Roman law and is used for instance in Thomas Aquinas' commentary on Aristotle's teaching regarding[48] conventional slaves: that[49] conventional slavery, *i.e.*, the enslavement of men who are not by nature slaves, is a benefit of the *ius gentium*, because strictly speaking they could have been killed, and therefore to enslave them is a humane act.[lii] This goes back to the Roman law doctrines. Paragraph 6, the beginning.

Reader: "Nevertheless, as regards the belief of some theologians, that it is unlawful for those to flee who have been captured in an unjust war,[liii] or are born of captives, unless they flee to their own people, I have myself no doubt that the view is erroneous."

LS: The theologians take very strict the obligation to serve the masters.

Reader:[liv]

> There is indeed this difference, that if captives make their mistake to their own people when war is still in progress they obtain their freedom by right of postliminy; if they flee to others or to their own people after peace has been made, they must be given up to the master who claims them. But it does not follow as a consequence that a bond of conscience is laid also by

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[l] This brief selection, a quotation from Servius' *On the* Aeneid, appears in a note to the print edition of the translation. "Hesione" is marked inaudible in the original transcript. *JBP*, 3.7.1.3 (n. 3).

[li] The words "mollified" and "the captives" are marked inaudible in the original transcript. *JBP*, 3.7.5.1.

[lii] Aquinas, *Commentary on Aristotle's Politics*, trans. Richard J. Regan (Indianapolis: Hackett, 2007), bk. 4, chap. 5.

[liii] Strauss changed the translation of *bello justo* from unlawful to unjust, page 325n.

[liv] Kelsey's translation of the selection to follow: "There is indeed this difference, that if captives make their escape to their own people while the war is still in progress they attain their freedom by right of postliminy; if they flee to others or to their own people after peace has been made, they must be given up to the master who claims them. But it does not follow as a consequence that a bond of conscience is laid also upon the captives; there are many rights which look only to an external judgment, and such are the rights of war which we are now explaining." In the original transcript "postliminy" is marked "inaudible." Grotius, *JBP*, 3.7.6.1.

> the captives; there are many rights which look only to an external judgment, and such are the rights of war which are here now explained.

LS: In other words, here we see a certain—can we call it humanization?—in a way less strict. The theologians say you have to accept[50] [slavery] and bear it patiently, and he says this may be the highest demand, but it is not[51] [binding in conscience]. A man does not commit a criminal action if he tries to escape.

The importance of patience is also brought out in section 5, paragraph 6.

Reader:

> Certain canons forbid anyone to persuade a slave to desert his master's service. If you refer this to slaves who are undergoing a just punishment, or have bound themselves by a voluntary agreement, it is a just injunction. But if you refer[lv] to those who have been captured in an unjust[lvi] war or have been born of captives, it teaches that Christians should encourage Christians to be patient rather than to engage in an action which, although permissible, might offend minds alien to Christianity[lvii]—

LS: We must not underestimate this reasoning. It is very powerful, and even in present-day discussion. I remember there was a discussion about what the Jews should have done in concentration camps and they were accused of an unreasonable passivity. That is the same issue, the reason of course being that traditional Judaism is much more concerned with the fortitude in suffering than the fortitude in fighting. Some people do not understand that. But this was an issue here for Grotius, who obviously has some sympathy for the non-Christian impatience. These issues are in a way still alive.

In the beginning of the next chapter at the end of the first section, an example is taken of[52] [the Roman conquests].

Reader:

> In Caesar Ariovistus says: "It is the law of war that those who have conquered should rule those whom they have conquered, just as they please"; also: "The Roman people has been accustomed to rule the conquered, not according to another's dictation but according to its own judgment."[lviii]

LS: And of course no qualifications by a just war. The *ius gentium*, as Grotius has it,[53] [represents] Machiavellian[54] right rather than any natural right. According to the *ius gentium*, the conqueror can do to the conquered whatever he sees fit. In chapter 9 there are some illustrations of the same tendency. The first section of the first paragraph.

[lv] In the translation "it" is inserted here.
[lvi] In original, not "if you refer to those"; "if you refer it to those." Strauss changed the translation of *bello justo* from unlawful to unjust, page 325n.
[lvii] The section ends with the words "alien to Christianity or otherwise weak." *JBP*, 3.7.6.5.
[lviii] *JBP*, 3.8.1.1.

Reader:

> Just as in regard to those things which are captured from the enemy, so also in regard to the right of postliminy[lix] no very sound view has been advanced by those who in more recent times have laid claim to a knowledge of the law. The subject was treated with greater painstaking by the ancient Romans, but often rather confusedly, so that the reader could not distinguish what they ascribed to the law of nations and what to the Roman civil law.[lx]

LS: This is of course not the point. I don't have here an exact reference. Apparently this whole passage is the closest approximation I have found hitherto to what the Athenians and Thucydides say, which is what we loosely call Machiavellian[55] [right]. This passage shows his concern with the distinction between the *ius gentium* and civil law, and that concern was not so strong among the Roman lawyers as it is with Grotius. And why? Because the *ius gentium* in its original sense was a part of the Roman positive law, namely, that part which had to do with the dealings between a Roman citizen and a foreigner, whereas for Grotius the *ius gentium* means above all the law obtaining among nations, *i.e.*, a law which cannot possibly be merely the positive law of one civil society. The interest, the concern with this distinction, becomes of course very important.

In this same chapter we find quite a few references to a change in the *ius gentium*. Slavery as a simple custom of being captured in war was no longer a custom in Europe, and therefore the present *ius gentium* (I say "present" in the seventeenth century)[56] [from] which the Roman lawyers were very different, for example, in[57] [paragraph] 19 of this same chapter, at the beginning . . . .

Reader: "While I was writing these words, a judgment to that effect was rendered in the highest chamber in Paris under the presidency of Nicholas of Verdun[lxi]—"

LS: I'm sorry; I meant paragraph 1.

Reader:

> In our times, however, not only among Christians but also among most Mohammedans, both the right of captivity apart from war, and likewise that of postliminy, have disappeared, since the necessity for either was removed by the restoration of the force of the relationship which nature has wished to prevail among men.[lxii]

LS: Kinship. In other words, also the Muslims recognized that, and therefore the right of war has been radically changed.

[lix] The Latin is *postliminium*.
[lx] *JBP*, 3.9.1.1.
[lxi] In original, not "in Paris"; "at Paris." *JBP*, 3.9.19.2.
[lxii] *JBP*, 3.9.19.1.

Reader: "Nevertheless, that ancient law of nations[lxiii]—"

LS: "That ancient law of nations." There's a new law of nations. The ancient law of nations is that which we know above all from the Roman writers, and that was a pagan *ius gentium* and now we have a non-pagan. This is of course of no fundamental difficulty because *ius gentium* is by its nature volitional, whether it is partly based on divine will as distinguished from human will does not make it any more natural.

The next chapter, the beginning.

Reader:

> I must retrace my steps, I[lxiv] must deprive those who wage war of nearly all the privileges which I seen to grant,[lxv] yet did not grant to them. For when I first set out to explain this part of the law of nations I bore witness that many things are said to be "lawful" or "permissible" for the reason that they are done with impunity, in part also that coactive tribunals lend to them their authority;[lxvi] things which, nevertheless, either deviate from the rule of right (whether this has its case in law strictly so called, or in the admonitions of other virtues),[lxvii] or at any rate may be omitted on higher grounds and with greater praise among good men.[lxviii]

LS: Is this clear, about the relation of *ius gentium* and natural right? Certain things are not punishable, presumably because it is too difficult or practically impossible to punish, and this is—therefore, law courts will not even try to enforce them. This is a key point. Then we would reach this distinction within the whole moral sphere, between prescriptions which are enforceable and prescriptions which are unenforceable. The unenforceable ones are the moral demands par excellence; the enforceable ones are also demanded by morality, but they can be externally enforced and therefore a man may never transgress the law and yet he may be morally absolutely crooked.

The heading of[58] [paragraph] 2 makes clear, I think, that the *ius gentium* is in a sense injustice.

Reader: *The principle stated is applied to the things which we said were permitted by the law of nations*[lxix]

LS: In connection with the first heading, sense of shame forbids what the law permits.

[lxiii] *JBP*, 3.9.19.2.
[lxiv] In original, not "I"; "and."
[lxv] In original, not "seen to grant"; "seemed to grant."
[lxvi] In original, not "in part also that"; "in part also because."
[lxvii] In original, not "has its case in law"; "has its basis in law."
[lxviii] *JBP*, 3.10.1.1.
[lxix] *JBP*, 3.10.2.

Now let us turn to two more passages in the beginning of chapter 3, paragraph 2. I'm sorry, chapter 11, paragraph 2.

Reader: "When it is just to kill—for this must be our starting point—in a just[lxx] war according with moral justice[lxxi]—"

LS: He says internal justice,[lxxii] but internal means what cannot be brought before external justice, *i.e*., the justice of a law court.

Reader:

> and when it is not just to do so, it may be understood from the explanations which were given by us in the first chapter of this book.[lxxiii]
>
> Now a person is killed either intentionally or unintentionally. No one can justly be killed intentionally, except as a just penalty or in case we are able in no other way to protect our life and property; although the killing of a man on account of transitory things, even if it is not at variance with justice in the strict sense, nevertheless is not in harmony with the law of love. However that punishment may be just, it is necessary that he who is killed shall himself have done wrong, and in a manner punishable by penalty of death on the decision of a fair judge.[lxxiv] But we shall here say less on this point, because we think that what needs to be known has been sufficiently said in the chapter on punishments.[lxxv]

LS: In other words, the right of truly just killing, as distinguished from that killing permitted by the *ius gentium*. Clearly, when a town is conquered,[59] all kinds of people come to grief, not only guilty people or specifically people guilty of capital punishment. Now this is elaborated in the whole context.

There seems to be in paragraph 6 in the second section—that's the last passage we will discuss today—

Reader:

> Often there occurs what we find stated in Cicero regarding the war between Caesar and Pompey: "There was some uncertainty; there was a contest between the most eminent generals; many were in doubt about what would be best to do." The same office says elsewhere:[lxxvi] "Even if

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[lxx] Strauss changed the translation of *bello justo* from unlawful to unjust, page 325n.
[lxxi] *JBP*, 3.11.2.
[lxxii] The Latin is *iustitia interna.*
[lxxiii] In original, not "it may be understood"; "may be understood."
[lxxiv] In original, not "a manner punishable by penalty of death"; "a matter punishable with the penalty of death."
[lxxv] In original, not "sufficiently said"; "sufficiently set forth." *JBP*, 3.11.2.1.
[lxxvi] In original, not "office"; "author."

> we are guilty of some fault arising from human error, we are certainly guiltless of crime."[lxxvii]

[**Student**]**:** In his first book *On Duties*, Cicero says that we should spare those who were not cruel and not inhuman in war, then in wars in which the prize is glory of empire should be waged with less bitterness.[lxxviii]

LS: Why? Why should a war in which the aim is glory be fought with less bitterness?

Student: Because you're not fighting for your very survival.

LS: It redounds to your glory if you are gracious. Think of the black prince treating the French king who was his prisoner as his honored guest—it redounds to his glory. Was it not the black prince?[lxxix]

Student: No, he behaved very badly. That's why he's known as the black prince.

LS: But in this case—he took the French king prisoner [and treated him well]. But go on.

Reader: "In this sense, King Ptolemy informed Demetrius that 'They were fighting not for existence, but for empire and glory.'"[lxxx]

LS: Literally, not about all things, which includes of course not the most necessary means of living, which he means by existence. There is a strange way from here to the passage in Machiavelli. Naturally Machiavelli wrote earlier, but it is a good commentary. One only addresses this question to Grotius—if they do fight about all things, then the war will be extremely tough, and that's where Machiavelli comes in. Or, if you please,[60] [Carneades] and the question of the two men on the raft.

Student: He used Cicero in this quotation about wars of glory, but it comes about if one is punishing somebody who is unjust, one may wind up with a conquered country and have an empire.

LS: That is of course a great question, whether the Roman[61] [claim] that they acquired the empire only by defending unjust attacks—this is [not] so convincing . . . why did they not leave these allies independent? And Cicero was not so simple as to believe that. If you only read the Second Book of the *Republic*,[62] [which is] unfortunately in a fragmentary state but still this much comes clear, that Cicero saw quite well that there was a lot of fiction, of legal and other fiction, which was underlying the Roman empire. The best one could say would be that if the Romans got an empire, they got it

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[lxxvii] Cicero, *For M. Marcellus* 10.30, 5.13; quoted in *JBP*, 3.11.6.2.
[lxxviii] Cicero, *On Duties* 1.35, 1.38.
[lxxix] Edward "the Black Prince" of England (1330-1376) captured the king of France and his son on a campaign in France and treated them very chivalrously. Some tactics he used in war, however, violated standards of chivalry.
[lxxx] *JBP*, 3.11.6.1.

absentmindedly. But if it makes it more moral, that's a long question, because you are somewhat responsible for what you do. They surely didn't keep it absentmindedly.

I believe we [must] leave it at this, because I had to make a division in chapter 11 for the sake of external equality, and I think I said up to paragraph 6.

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[1] Deleted "[inaudible]."
[2] Deleted "guise."
[3] Deleted "vanity."
[4] Deleted "the."
[5] Deleted "and."
[6] Deleted "[inaudible]."
[7] Deleted "based."
[8] Deleted "in."
[9] Deleted "try to."
[10] Deleted "rights."
[11] Deleted "however nothing."
[12] Deleted "[inaudible]."
[13] Deleted "if we consider the fact."
[14] Deleted "[inaudible]."
[15] Deleted "perhaps."
[16] Deleted "was."
[17] Deleted "it is there."
[18] Deleted "not."
[19] Deleted "it."
[20] Deleted "then some."
[21] Deleted "irredentia."
[22] Deleted "it."
[23] Deleted "fighting and non-fighting."
[24] Deleted "[inaudible]."
[25] Deleted "he."
[26] Deleted "fighting."
[27] Deleted "[inaudible]."
[28] Deleted "[inaudible]."
[29] Deleted "overestimated."
[30] Deleted "already."
[31] Deleted "if."
[32] Deleted "bold."
[33] Deleted "his."
[34] Deleted "is."
[35] Deleted "what."
[36] Deleted "including."
[37] Deleted "for that."
[38] Deleted "brims."
[39] Deleted "[inaudible]."
[40] Deleted "[inaudible]."
[41] Deleted "a classic, but no."
[42] Deleted "last."
[43] Deleted "the."
[44] Deleted "as an."
[45] Deleted "[inaudible]."
[46] Deleted "close sublimation to."
[47] Deleted "how."
[48] Deleted "the."
[49] Deleted "the."

[50] Deleted “[inaudible].”
[51] Deleted “[inaudible].”
[52] Deleted “[inaudible].”
[53] Deleted “qualifies.”
[54] Deleted “or [inaudible].”
[55] Deleted “[inaudible].”
[56] Deleted “of.”
[57] Deleted “chapter.”
[58] Deleted “section.”
[59] Deleted “and.”
[60] Deleted “Canaedus.”
[61] Deleted “principle.”
[62] Deleted “when he.”

Session 13: November 17, 1964

Leo Strauss: [i]Before I turn to today's discussion, there are a few points. First, Mr. ___ was so good as to look up in Cicero's dictionary regarding *iura hominum*, the rights of man. The terms are there, so the terms should not come as a surprise in Grotius or any other writer. What one can take for granted is that he does not mean "the right of man" of[1] [modernity], but the laws recognized by government. In other words, the same thing which Aristotle meant, although he didn't use the term, from chapter 14 of the First Book of[2] [the *Politics*], when he speaks of two laws, one law which is peculiar to one city, and another which is recognized[3] [elsewhere].[ii]

Now I come back to another point which is more directly connected with this seminar, but after all we don't have to draw the lines so pedantically. Some of you or most of you were present, I believe, when I addressed the student union and there was a short discussion between Mr. Reinken and me. I would like to take this up now because there is no foreseeable student union meeting where I could say what I am going to say. Now I think Mr. Reinken was quite correct and I was quite wrong. My general thesis was [that] facts are not enough: they have to be interpreted, and the interpretation will become interesting only the moment we come to a fact which is a value, to use this horrible[4] [term]. I gave the example of the desegregation problem, and then Mr. Reinken said: If we are precise, we find a fact—say, that there is no racial inequality in the world—and this becomes meaningful only by being subsumed under a value judgment, the value judgment being equal men must be treated equally. That is quite true, and of course the question is here: Is that an arbitrary value judgment? You would [not] admit that it is arbitrary. But still, logically one could maintain the distinction between[5] [fact and value]. I admit that. But I would say I was misled by a broader phenomenon and I thought I could make it more clear this afternoon without bringing in any more subtleties.

I would like to mention the one point that I have ultimately in mind, and that is this. When we speak of facts and values in the usual manner, it is naturally required of us that we know what the difference between the fact and the value is. Now these questions, what is a fact, and what is a value, what kinds of questions are they? Factual questions or value questions?

Student: Factual.

LS: Precisely. If you accept these very simplistic distinctions, you have to say it is a factual question. So the question What is a value? is a factual question. That settles it, no doubt. But if you take one simple example: according to the crudest, most stupid and most vulgar view, a value is an object of desire. I never have found this definition in any

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[i] The original transcript notes that the session began with the reading of a student's paper. The reading was not recorded.

[ii] A possible reference to the end of Book I of the *Politics*, where Aristotle discusses the different laws regarding family in different regimes. Book I is usually divided into only thirteen chapters. Aristotle, *Politics* 1259b18-1260b25.

book, but I would say it is underlying many discussions. An apple is a value, but health, assuming that we eat apples for the sake of health—health is also a value, but a value of a broader kind. I suppose some people would say: No, merely desired things are not values, but the point of view from which we desire them, in this case health, pleasure, etc., these are the values. This is all strictly factual. Now we go and see. Well, you say, any object of desire is a value. But there you see someone who has a passionate desire for a cigarette, but at the same time he strongly disapproves of smoking cigarettes. Then what is his fact: the object of his desire, or that which is the outcome of a deeper decision?

Student: The latter.

LS: You would say that. It's controversial. I would agree with you. In other words, if someone desires something which he regards as a responsible human being as undesirable, then the responsible judgment has a higher status.

Now if we take this factual distinction—a distinction between something merely desired and something which is the object of a moral choice—[a] factual distinction. But the consequence from the first point of view [is that] any object of desire, however fantastic, far-fetched, is a value. From the latter point of view, only a segment of what you had under number one can be a value. So the factual question, what is value, determines what can possibly be a value, and therewith devaluates certain so-called values. Is this clear? This clear distinction between choice and mere desire is only the beginning of course of a true analysis, and the question is whether an analysis [pushed] sufficiently far[6] would not bring out another set of straight value views (see what I mean?) which have all the character of value judgments.

Now this of course was the older view, the older view where it was taken for granted that if we understand human nature, we will know what is good for man and on what level. That something could be good for man on the lowest level, namely, giving him momentary satisfaction,[7] which every pleasure could do, [as] was admitted by every sane person. The question is: What is the goodness of that goodness? This is what I really had in mind, and sometimes we teachers can be very immoral., *i.e*., using crude simplification which we hope can get by and which will act nevertheless as a kind of seed. Teaching is sowing.

Let us turn then to chapter 11, paragraph 7, section 4, at the beginning.

Reader:

> An enemy, therefore, who wishes to observe, not what the laws of men permit, but what his duty requires, what is right from the point of view of religion and morals, will spare the blood of his foes; and he will condemn no one to death, unless to save himself from death or some like evil, or because of personal crimes which have merited capital punishment.[iii]

[iii] *JBP*, 3.11.7.4.

LS: The question arises, then: Is the right to kill prisoners only of human origin, because the human laws permit it? Is this precise enough? Which law permits to kill prisoners without necessity? *Ius gentium*. And the simple conclusion which I believe was self-evident is that the *ius gentium* is of course a human law. Human law consists of two chief parts: the civil law (the municipal law), and the *ius gentium*. In paragraph 9 in the second section.

Reader: "In the first place, with regard to children we have the judgment of those people and ages over which moral right has exerted the greatest influence."

LS: That is right, but it has something to do with the biblical meaning of righteousness and the Greek meaning of justice.

Reader: "'We have arms,' says Camillus in Livy, 'not against that age which is spared even when cities are taken, but against men and arms.'[iv] He adds that this has a place among the laws of war, that is the natural laws."[v]

LS: Natural law rights of war forbid the things permitted by the *ius gentium*. I think we have all understood this by now.

Student: Does this identification of laws of war with natural right, which occurs several times here, indicate that the *ius gentium* with respect to war is properly speaking not a law at all?

LS: No; it's the *ius gentium*, it's *ius*. But it is of a lower order and it is a concession to human frailty, and from this point of view inferior to natural right. But we have seen also other cases where the *ius gentium* is superior to the natural right. Think of burial: the duty of burial is an institution of the *ius gentium* and that is a more humane practice than to leave the soldiers simply [to] rot. We discussed this difficulty last time—this ambiguity of *ius gentium* on the one hand lower, and on the other higher than natural right. We have to turn to paragraph 10, the beginning.

Reader: "The same principle is in general to be applied to men whose manner of life is opposed to war. "By the law of war armed men and those who offer resistance are killed," as Livy says; that is, by that law which is in harmony with nature."[vi]

LS: Now turn to the next section of the same paragraph.

Reader:

> In the same class with priests are deservedly ranked those who have chosen a similar manner of life, as monks and novices, that is, canons;[vii]

[iv] In original, not "'men and arms'"; "'men in arms.'"
[v] *JBP*, 3.11.9.2.
[vi] *JBP*, 3.11.10.1.
[vii] In original, not "cannons"; "penitents."

> these the canons, in accordance with natural justice, order men to spare just the same as priests.
>
> To priests and penitents we may properly add those who direct their energies to literary pursuits,[viii] which are honorable and useful to the human race.[ix]

LS: The beginning of the next paragraph.

Reader: "In the second place farmers, whom the canons[x]—"

LS: In other words, peaceful population. One of you made a remark to this effect in his paper,[8] [concerning] the demands of Rousseau, war only against the belligerents. It is in[9] [Grotius], but it is, how should I say, rendered somewhat invisible by the very general *ius gentium* that permits everything. But the principle is still there, and it is not only Grotius, but you see what Camillus in Livy says. Paragraph 13, second section.

Reader: "In his history of the Eugorathene War Sallust,[xi] having related that youths had been killed after surrendering, says that that was done contrary to the law of war; this is to be interpreted as against the nature of justice and the usage of more civilized peoples."[xii]

LS: This makes it slightly ambiguous again. Why does he not simply say: done against *ius naturale*? You see the manner, the custom, of the more gently living people—that sounds like the *ius gentium*, of the more civilized nations. Paragraph 16.

Reader:

> Against these precepts of justice and the law of nature frequently exceptions are offered, which are by no means just; as, for example, if retaliation is required, if there is need of inspiring terror, if too determined a resistance has been offered. Yet he who recalls what has previously been said in regard to valid reasons for putting to death, will easily perceive that such exceptions cannot afford just grounds for an execution.[xiii]

LS: That's very interesting. No deviation from the rules of humanity, as we can tentatively say, for the sake of reprisals or because of the strong resistance which has continued the butchery so long. By the way, there is a slight ambiguity against those principles of equity and natural right. Why does he not give a summary paragraph in

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[viii] In original, not "we may properly add"; "you may properly add."
[ix] *JBP*, 3.11.10.2.
[x] *JBP*, 3.11.11.1.
[xi] In original, not "Eugorathene War"; "Jugurthine War." The name "Sallust" is marked inaudible in the original transcript.
[xii] The word "youths" is marked inaudible in the original transcript. *JBP*, 3.11.13.2.
[xiii] In original, not "cannot"; "do not." *JBP*, 3.11.16.1.

which he makes it clear beyond a shadow of doubt what the relation between equity and natural right is? Or are these more or less synonyms?

But here at this point his commentator makes a remark which is quite interesting. It must be observed that neither the savagery of the Spaniards against the Dutch nor the savagery of the Frenchmen against the Protestants could have been coerced other than by similar savagery. Do you get it? Gronovius raises the question whether reprisals are not absolutely necessary.

Paragraph 7, that's a simple point: in the case of a large multitude being guilty, not right but compassion comes into play. According to right, they are all guilty of death, of course, and the reason [for compassion] is preservation of the community in question, and indirectly the preservation of the human race. Now let us turn to chapter 12 and begin with paragraph 6. That is about destruction.

Reader: "While what has been said holds true of other things of artistic value, for the reason which we have already given, there is—"

LS: That also may interest those among you who wonder sometimes about our language. Do you know what things of artistic value are? Things for adornment, *i.e.*, not for mere use. So many things have become degraded that it becomes necessary to coin ever-new words, but the new coinage is not as good, it seems, as the older ones. Artistic value.

Reader:

> there is a particular reason in the case of those things which have been devoted to sacred uses. Although such things also, as we have said elsewhere, are public in their own way, and so, according to the law of nature,[xiv] are violated with impunity, nevertheless, if there is no danger from them, reference for divine things urges that such buildings and their furnishings be preserved,[xv] particularly among those who worship the same God, in accordance with the same law, even if perhaps they disagree in respect to certain doctrines or points of ritual.[xvi]

LS: In other words, Catholics should not destroy Protestant chapels and vice versa, but with mosques it is slightly different and with Buddhist temples still more different. But the question is: Is the saving of the temples as such a precept of natural right? That is of some importance because it would again reinforce a point that natural right as such is indifferent to the difference of religions. This is in a way trivial, but nevertheless . . . .Let us read the beginning of paragraph 7.

Reader:

> What I have said of sacred things must also be understood of consecrated things, also of structures erected in honor of the dead; these cannot be

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[xiv] In original, not "nature"; "nations."
[xv] In original, not "reference for divine things"; "reverence for divine things."
[xvi] *JBP*, 3.12.6.1.

> violated without contempt for human feeling,[xvii] even though the law of nations does accord impunity to the venting of anger against them. The jurists say that that is the highest reason which acts in defense of religion.[xviii]

LS: That is hard—he doesn't say that the destruction of such consecrated things is in accordance with the *ius gentium*, but is their preservation and the respect for them also *de iura gentium*? I think Grotius evades the issue here by saying that it is not a matter of strict right, natural right. But it is a matter of humanity, and humanity, as we know, is not strict right. This question will come up later again.

Let us turn to the next chapter, paragraph 1, section 2. This concerns captured things.

Reader: "Furthermore in this case also it will be the task of equity and goodness to[xix]—"

LS: Now let me see one moment.

Reader: I'm sorry. 13.1.2. "Now since a debt may be due to us either because of an inequality of possessions—"

LS: Meaning in the exchange.

Reader:

> or as a result of a punishment,[xx] the property of enemies may be acquired for either reason, but still with a distinction. For we have previously said that by a debt of the former source[xxi] not merely the property of the debtor, but also that of his subjects, according to the accepted law of nations, is to be made liable.[xxii]
>
> This right of the law of nations, indeed, we hold to be of another kind from[xxiii] that which exists in mere impunity or the external power of courts of law. For just as he with whom we have completed the transaction by our private consent acquires not only a legal but also a moral right to our property,[xxiv] so also a right is acquired by a kind of common consent, which to a certain force contains in itself the consent of individuals,[xxv] in the sense in which a law is called "a common agreement of the state." It is the more credible that such a basis of right would be approved by nations

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[xvii] In original, not "these cannot be violated"; "for these cannot be violated."
[xviii] *JBP*, 3.12.7.1.
[xix] *JBP*, 3.14.1.2.
[xx] In original, not "a result"; "the result."
[xxi] In original, not "source"; "sort."
[xxii] In original, not "is to be made liable"; "is made liable, as though in the case of surety."
[xxiii] In original, not "from"; "than."
[xxiv] In original, not "the transaction"; "a transaction."
[xxv] In original, not "to a certain force"; "through a certain force."

> in the kind of affair under consideration because the law of nations was introduced[xxvi]—

LS: This law of nations.

Reader: "because this law of nations was introduced not only for the sake of avoiding greater evil but also to secure to each one his right."[xxvii]

LS: That is a very important passage about the complexity of the *ius gentium*. There are two kinds of it, and one kind was introduced only in order to avoid greater evil. I would tentatively suggest that that applies to the harsh *ius gentium*, that we permit all these terrible things in war in order to have some flooring, however low. And then there is another kind, say, like monogamy and other things, which goes beyond, which goes even higher than the natural right strictly understood.

By the way, here he also uses an expression which[10] [the translator] mistranslates. It is deplorable, because these things can easily be done on the basis of half a year of Latin. Now what was that? This was *ius*[11] *[internum]*. Where does that occur?

Reader: Second paragraph of section 2.

LS: In the second half of paragraph 1 of section 2, not only in an external but an internal . . . .[xxviii] And how does he say there?

Student: Legal but immoral; but he has been doing that consistently.

LS: I know, but since he uses moral right also for . . . . We take up this subject of internal right later on. Now according to Gronovius, the second kind of *ius gentium* is what agrees with the natural right, namely, that which was introduced and demanded after the introduction of property. As it is demanded after the introduction of property and while saving one's conscience, which I suppose means acting conscientiously.

It is also implied here that the *ius naturae*, the natural right, is more than what consists in impunity, but it must be not only not punishable, but must be intrinsically innocent.

Natural right does not approve of any actions which while being in fact unpunishable, are yet not innocent. This we must keep in mind. Paragraph 4, section 1.

[change of tape][xxix]

[xxvi] In original, not "would be approved"; "was approved."
[xxvii] *JBP*, 3.13.1.2.
[xxviii] Grotius uses the phrase *internum jus*, which the translator renders as moral right.
[xxix] Because the tape was changed, the passage recited by the reader was not entered in the original manuscript. Here is the passage as taken from the translation: "But we must keep in mind that which we have recalled elsewhere also, that the rules of love are broader than the rules of law. He who is rich will be guilty of heartlessness if, in order that he himself may exact the last

LS: *I.e.*, of compassion. That we all know from ordinary practice, but the question is: Does right strictly understood imply also natural right? That is the interesting question. That civil law does not demand that is clear, but does not natural right strictly understood—[12][does it not go as] much beyond, [to] compassion or charity too? What do you think?

Student: It doesn't demand that.

LS: That is also mine . . . if I understand it, and I would say this is exactly the point which Grotius makes. The distinction between right strictly understood and right broadly understood is that right strictly understood does not require fulfillment of the duties of humanity, compassion, and so on.

Student: As far as I can see, when everyone talks about *right*,[13] it refers to the natural right.

LS: There is no doubt about that. Let us turn to the next section.

Reader:

> Therefore humanity requires that we leave to them that do not share the guilt of the war,[xxx] and that have incurred no obligations in any other way,[xxxi] those things which we can dispense with more easily than they, particularly it is quite clear[xxxii] that they will not recover what they have lost in this way. Here applies what Cyrus said to the soldiers after the capture of Babylon:[xxxiii] "What you have, you will hold not unjustly; but if you do not take away anything from the enemy that will be an evidence of your humanity."

LS: This is of course again not historical fact but of one's invention. In Greek, of course, humanity is *philanthropia*, love of human beings, which originally did not have this meaning which it has today, because some people are lovers of dogs, others are lovers of birds, others are lovers of music, and some are also lovers of human beings. Some passage in Xenophon (I can't put my finger on it now) is to this effect.[xxxiv]

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penny, he deprives a needy debtor of all his small possessions; and even much more guilty if the debtor has incurred the debt by his goodness—for instance, if he has gone surety for a friend—and has used none of the money for his own advantage, 'for,' as Quintilian the Father says, 'the peril of a bondsman is worthy of commiseration.' Nevertheless so hard a creditor does nothing contrary to his right according to a strict interpretation." *JBP*, 3.13.4.1.

[xxx] In original, not "share the guilt of war"; "share in the guilt of war."

[xxxi] In original, not "in any other way"; "in any other way than as sureties."

[xxxii] In original, not "particularly it is quite clear"; "particularly if it is quite clear."

[xxxiii] In original, not "the soldiers"; "his soldiers." The name "Cyrus" is marked inaudible in the original transcript.

[xxxiv] Xenophon uses the term *philanthropia* in the *Education of Cyrus* in the passage cited by Grotius (VII.5.73) and at I.4.1.

The distinction then between justice and philanthropy or humanity goes back to Xenophon, so this is not a modern distinction. Now we must not forget this thing which we know already for some time, that Grotius' distinction between justice narrowly understood and justice in a broader sense goes back to the Aristotelian distinction between justice strictly understood and universal justice. So not the mere distinction can reveal anything to us, but we would have to see what Aristotle implies and means by it, and what Grotius implies. In the case of Xenophon, I think he renders not only the original correctly, but the thought. That opens up a long investigation: To what extent is[14] [Cyrus][xxxv] the perfect ruler, the incarnation of justice and morality? And the whole book shows that this was an extremely shrewd Machiavellian who had very well understood that an air of kindness and morality can do more for you than many divisions, and he acted accordingly—so that this is of course a question into which Grotius is not obliged to go, but the interpreter of Grotius would have to consider it in one way or another. In Aristotle the word *philanthropia* does not occur; it is not in the *Ethics*. But it occurs already in Xenophon.

Now let us turn to chapter 14 and read the beginning.

Reader: "In those places where custom[xxxvi] sanctions the captivity and slavery of men, this ought to be limited primarily, if we have regard for moral justice[xxxvii]—"

LS: "To internal justice."

Reader:

> in the same way as in the case of property; with the result that, in fact, such acquisition may be permitted so far as the amount of either an original or derivative debt allows, unless perhaps on the part of the men themselves there is some special pride which equity would suffer to be punished with loss of liberty.[xxxviii] To this degree, then, and no further, he who wages a lawful war has the right over the captured subjects of the enemy,[xxxix] and this right he may legitimately transfer to others.[xl]

LS: So the right to enslave people derives only from a just war, and only as a compensation for damages, or as a punishment for capitally guilty individuals. This is clear. Here he uses synonymously "equity" and "internal justice." Let us turn to paragraph 2, section 3, the beginning.

[xxxv] Strauss seems to be commenting on the citation from Xenophon's *Education of Cyrus* in the passage just read.
[xxxvi] This word is marked inaudible in the original transcript.
[xxxvii] In original, not "for moral justice"; "to moral justice."
[xxxviii] In original, not "special pride"; "special crime."
[xxxix] In original, not "the right"; "a right."
[xl] *JBP*, 3.14.1.1.

Reader: "Therefore that which may be done to a slave with impunity according to the law of nations differs widely with that which natural reason permits to be done."[xli]

LS: It is natural reasoning and natural right and here natural right strictly understood. Paragraph 6, section 2.

Reader:

> Seneca, moreover, in the passage cited proves that in relation to certain matters the slave is free, and that he has also the means of conferring a penalty,[xlii] if he does something which exceeds the measure of his duty as a slave; something which is tendered not at a command, but voluntarily, where there is a transition from the obligation of service to the affection of a friend; this Seneca explains at length. It is in harmony with these ideas that if a slave, as in Terence,[xliii] in his leisure hours, has saved something by cheating his own soul, or by his indiscreteness,[xliv] this is in some way his own.
>
> Theophilus does not do badly to define the slave's savings as a "natural patrimony,"[xlv] as you might define "the union of slaves"[xlvi] as "a natural marriage."

LS: *I.e.*, not legally recognized.

Reader:

> Ulpian also calls the slave's savings a diminutive patrimony. It did not matter that the master can at his discretion take away or lessen the patrimony,[xlvii] for if he does this without cause he will not do what is just. By cause, however, I understand not only punishment, but also the master's necessity; for the advantage of a slave is subordinate to the advantage of his master,[xlviii] even more than the interests of citizens subordinate to that of their state.[xlix]

LS: Lest we forget the indications of Grotius' humanitarianism. Slaves remains slaves, all right, there is no doubt about that. In the same chapter, section 4.

Reader:

[xli] In original, not "with that"; "from that." *JBP*, 3.14.2.3.
[xlii] In original, not "penalty"; "benefit."
[xliii] The words "as in Terence" are marked inaudible in the original transcript.
[xliv] In original, not "indiscreteness"; "industry."
[xlv] *Peculium* is slave's savings in Latin.
[xlvi] *Contubernium* is Latin for the union of slaves.
[xlvii] "It does not matter" is the beginning of this sentence in the translation.
[xlviii] In original, not "a slave"; "the slave."
[xlix] In original, not "the interests of citizens subordinate"; the interests of citizens are subordinate." *JBP*, 3.14.6.2.

> Among many peoples the laws have reduced even the external right of masters to this internal justice,[l] which we are explaining. For among the Greeks slaves who had been too harshly treated were permitted "to demand their say,"[li] and in Rome to take refuge at statues,[lii] or to seek the aid of the magistrates against cruel starvation or intolerable wrong.[liii] Furthermore it will happen, not from a strict interpretation of law, but from humanity and kindness, that in times the slave will be given their freedom,[liv] which is due to him on ground of long or very great services.[lv]

LS: So what is the relation of that internal justice to[15] humanity and beneficence? I believe it is not the same, because humanitarian beneficence would be justice broadly understood and the other is natural justice, natural right, strictly understood: *iustitia interna* (internal justice). That corresponds to *ius internum*. Internal justice is that form of justice which is concerned with complying with internal right, *i.e*., a right not imposed from outside by other human beings or by God, which is written in the heart of man.

Student: And you're saying that is equivalent to justice strictly understood.

LS: I think so. I think that we have to make this distinction: There is right in the full sense that includes all humanity, beneficence, and so on; justice in the narrow sense which is a segment of that; and then we get the *ius gentium*, which in certain spheres is even less than right strictly understood—because right strictly understood would not permit you to kill women and children of an enemy city, whereas *ius gentium* would permit it. What's your difficulty?

Student: I can't say specifically, but in this full section on what is permitted in war, the first treatment was by natural right, and then to *ius gentium* and then this return to natural right, but the requirements seem to be raised.

LS: You were the one who read the paper on chapters 1 to 5. What was that you taught us?

Student: The first chapter was on natural right, and then from [chapter] 2 all the way up through 10 was *ius gentium*. I would say that starting with [chapter] 10 and then continuing, we are not returning to[16] natural right, but we are really returning to obligation, humanity. We are returning to justice.

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[l] Throughout this session the reader replaces (on Strauss's suggestion) the translation's moral justice with internal justice.
[li] In original, not "'say'"; "'sale.'"
[lii] In original, not "in Rome"; "at Rome."
[liii] In original, not "cruel starvation"; "cruelty or starvation."
[liv] In original, not "that in times the slave will be give their freedom"; "that at times a slave will be given his freedom."
[lv] *JBP*, 3.14.6.4.

LS: I think first he gives the tough things—I mean, disregarding the introductory chapter. First he gives the *ius gentium* with all the incredible freedoms [to violate natural justice], and then he gives [it] in the form of admonitional natural right,[17] [which requires] even more than natural right.

Student: In a way,[18] strict natural right has already been stated at the beginning of this book and even in the course of the second Book. The main points of whom you can kill, how much property you can take, sort of follows from the second Book easily, so that now that we're getting to moderation, we're sort of getting everything from it.

LS: No, no. Grotius wanted to conclude the book in a humane manner, and therefore it comes toward the end. But the question with which we are concerned is the relation between internal justice and right strictly understood. Now here we have the example of slavery, and in one of the paragraphs which we read was that the slave would have to be treated rather decently. But here he spoke of internal justice, and what is the right strictly understood regarding slavery? If my previous suggestion is right, that right strictly understood and internal justice are the same, the question is unnecessary. It does not make sense. But I am not quite sure; there is a certain darkness here.

Now let us turn to paragraph 8 of chapter 14.

Reader: "In another connection we raised the question, whether and to what extent the offspring of slaves are bound to the master by internal justice."

LS: He says here right. *Iura*.

Reader:

> This question should not be passed over here, because it particularly concerns prisoners of war. If the parents had merited death by their own crimes, then for the preservation of their lives the offspring which was expected of them should be bound to slavery,[lvi] because otherwise these would not be born. As we have said elsewhere, parents may in fact sell their children into slavery if otherwise they would face starvation. Such is the right which God granted to the Jews over the descendants of the Canaanites.
>
> However, children that were already born, no less than their parents, as part of the state could have been made liable for a debt of the state; but with regard to those who have not yet been born this really does not seem sufficient,[lvii] and another appears to be required. Either the obligation in question may arise from the express consent of the parents, along with the necessity of supporting the children, and then it may exist without end; or it may arise from the mere furnishing of sustenance, in

[lvi] In original, not "should be bound to slavery"; "could be bound to slavery."
[lvii] In original, not "this really"; "this reason."

> which case it exists only up to the time from their services shall have canceled all that has been expended[lviii]—

LS: In other words, you keep your book of what you have spent for these kids and then you figure out when they have earned it.

Reader: "If any further right over the children is given to their master, apparently it arises from the civil law, which to masters is more generous than just."[lix]

LS: Which is more generous to the masters than is fair. So he tries to humanize the civil law, there is no doubt about that, but what light does this throw on[19] natural right regarding slavery? This is natural right, obviously, that the offspring of slaves are slaves, at least for a considerable time. The *ius gentium* makes perpetual slavery out of it, and that is of course a deviation from strict right. Beginning of paragraph 9.

Reader:

> Among those peoples who do not avail themselves of the right of slavery as arises from war,[lx] the best course will be to exchange prisoners; the next best, to release them at a price that is not unfair. What that price is cannot be set forth in exact terms; but humanity teaches that it should not be raised to a point where the payment would place the prisoner in want of the necessities of life.[lxi]

LS: In other words, if he had to pay the ransom and devote the rest of his days to paying the ransom, that would be against humanity. But the indication here is that natural right does not simply decide in favor of this humane solution. Natural right may very well simply say—is open to the question of whether you will have slaves or you will have exchange of the prisoners at the end of the war. And the reason is perhaps this. A point which comes up somewhere: among very warlike savage tribes, to have been a prisoner of war is more terrible than to remain a slave of a tolerable, decent master among the civilized people. This also has to be taken into consideration. He refers to this somewhere, especially on the chapter on postliminy: how the early Romans, for example, regarded it as a disgrace to be a prisoner of war and not have escaped while you were there.[lxii] I think some relics of this notion still survive. I saw a British movie in which one fighter pilot claims the superiority over another because he had been captured by the Germans but escaped, and the other stayed the whole four years in a German prison camp.

Now let us turn to the next chapter, the first paragraph.

Reader:

[lviii] Kelsey has "when their services shall have canceled all that has been expended for them."
[lix] *JBP*, 3.14.8.1-2.
[lx] In original, not "as arises from war"; "which arises from war."
[lxi] In original, not the point where the payment"; "the point where its payment." *JBP*, 3.14.9.1.
[lxii] This is possibly a reference to *JBP*, 3.9.4.2.

> The equity which is required, or the humanity which is praised, in respect to individuals, is so much more required in praised and respect of people or parts of peoples[lxiii] in the degree that wrong or kindness to a large number of persons becomes more notable. And other things may be acquired in a lawful war, [lxiv] so there may be acquired both the right of him who rules over a people and the right which the people itself has in its sovereign power;[lxv] only so far,[lxvi] however, as is permitted by the measure of the penalty which arises from a crime or some other form of death.[lxvii]
>
> To these reasons should be added avoidance of extreme danger.[lxviii] But this reason is very often confused with others,[lxix] although both in establishing peace and making use of victory it deserves particular attention for its own sake.[lxx] It is possible to forego other things from compassion; but, in the case of public danger,[lxxi] a sense of security which exceeds the proper limit is the reverse of compassion.[lxxii]

LS: It is of some importance today. There can be a short-sighted form of compassion. The examples are all known to you. So in a just war, the victor acquires the rule over the guilty nation, if the guilt was so great as to deserve that punishment and if extreme danger justified the execution of this punishment. But internal justice requires the maximum of reasonable compassion. Does he speak of internal justice here? I have not watched it.

Reader: "*To what extent internal justice permits sovereignty to be acquired*"[lxxiii]

LS: Yes. You see this throws a new light on internal justice. Is internal justice then not simply identical with right strictly understood?

Student: In chapter 11 he has a little paragraph which shows that he understands the two to be the same, because in the English translation of moral justice,[20] [inside] the parentheses is *iustitia interna*. And then he goes on to say on the right to kill when it is not just to do so may be understood by the explanations which were given in the first chapter of this book, when he talks about the rights by *ius naturae*, natural right strictly understood. It is another way of saying exactly the same thing.

[lxiii] In original, not "required in praised and respect of"; "required and praised in respect to."
[lxiv] "As other things" is the beginning of this sentence in the translation.
[lxv] In original, not "in its sovereign power"; "in the sovereign power."
[lxvi] The translation has "only in so far."
[lxvii] In original, not "death"; "debt."
[lxviii] Kelsey has "the avoidance of extreme danger."
[lxix] In original, not "with others"; "with the others."
[lxx] The translation has "both in establishing peace and in making use of victory."
[lxxi] In original, not "in the case of"; "in case of."
[lxxii] Grotius concludes the paragraph with a quotation. "Isocrates wrote to Philip: 'The barbarians must be subjugated to a point which will enable you to make your country perfectly secure.'" *JBP*, 3.15.1.1.
[lxxiii] *JBP*, 3.15.1.

LS: But still, that *iustitia interna* is that justice which is concerned above all else with fulfilling natural right. That I can see. But that is not the question. And I think this is important that this should be made clear—that right strictly understood excludes considerations of humanity as such.

Student: In chapter 1 he was only concerned with natural right strictly understood. Now he uses the new term, "internal justice" and refers to chapter 1 and says we handled that. He is meaning more or less the same thing.

LS: But you see, that is also true of the whole discussion. What we are doing here is only to get a first sniff of Grotius and if we want to reach certainties, one has to go to the fine comment and invest much more time than we could. But keep this in mind, that this is an open question. I have here a note for my private purposes: internal justice different from *ius* strictly understood. That was my overall impression.

Student: The translator translates "moral justice," and then you see moral justice earlier in the work. Does he use *iustitia interna* in the earlier chapters?

LS: I cannot tell you. This is one of the terrible things in all these kinds of studies. You suddenly become aware of the term, and from that moment you watch it. Therefore, that is one of the Sisyphean characters of scholarly life—that you have to do all the work all over again, or else you have the complete previous knowledge of what things are important and to watch. Within limits that is possible, but since every author has his peculiarities, there is no way to go through this. *Repetitio mater studiorum*: R9epetition is the mother of study, an old adage. I haven't watched it and I suppose no one among you has watched it. It could be very valuable if someone had.[lxxiv]

Student: The fact that this translator puts it in parentheses in Book 3—if it occurred earlier, you would almost think he would put it in parentheses when it occurred.

LS: How reliable is the translator?

Student: He has used that bracketing considerably before.

LS: I have no doubt that he has been trying to emphasize the first occurrence of a given term, but how reliable is he? In ordinary human life, it is an excellent practice to say everyone should be regarded innocent until proven guilty, but one of the differences between scholarship and ordinary life is that this is not true. This is not a maxim of scholarship, that someone is regarded as reliable before he has proven his reliability. Since we have seen some unnecessary liberties which he takes, I would not build any argument on what he does.

[lxxiv] An electronic word search of the text indicates that the translator did use the phrase "moral justice" once prior to Book 3, at 2.5.28, where the phrase does translate "*interna justititia*." The theme of that passage is slavery, much in the spirit of the passages now under discussion.

Paragraph 2 of the same[21] [chapter] develops here, regarding the right of conquerors, at least this key point: the right of conquerors proper [does not extend to] the government of the defeated nation.[22] [No] permanent subjugation, no empire building. Paragraph 3.

Reader: "Sallust says of the ancient Romans[lxxv]—"

LS: Paragraph 3. You might read the quote from Augustine at the end of paragraph 2 to get an idea of the spirit of paragraph 2.

Reader: "Let them see to it, nevertheless, that it may not concern good men to delight in the extent of their dominion." . . . "It is a greater good fortune to live in harmony with a good neighbor than to subdue a bad neighbor who wages war[lxxvi]—"

LS: That is the spirit of the whole paragraph. No extension of empire.

Reader: "To this ideal—"

LS: Exemplar.[lxxvii]

Reader:

> To this exemplar of old-time innocence the closest approach is in the wise moderation of the ancient Romans. "What would our empire be today," says Seneca, "had not foresight mingled the vanquished with the conquerors?"[lxxviii] "Our founder Romulus," says Claudius and Capitus,[lxxix] "displayed so much wisdom that on the same day he had many peoples as enemies, and then as citizens."[lxxx] The cause of the downfall of the Lacedaemonians and Athenians was nothing else than the exclusion, of foreigners,[lxxxi] of those whom they had conquered. Livy says that the Roman power grew through the admission of enemies into the state. Examples are to be found in the history of the Sabines, Latins, and other[lxxxii]—

[lxxv] *JBP*, 3.15.2.1.

[lxxvi] "He adds also this" are the words said by Grotius between the quotations from Augustine. The second quotation concludes with the words "'on us.'" Grotius then writes: "Furthermore, the prophet Ammos severely reproves in the Ammonites this zeal for extending their borders by armed force." *JBP*, 3.15.2.2.

[lxxvii] The Latin *exemplar* can mean likeness or model, as well as ideal.

[lxxviii] The translation has "'had not salutary foresight mingled the vanquished with the conquerors?'"

[lxxix] In original, not "Capitus"; "Tacitus."

[lxxx] "He adds that" are the first words of the next sentence in the translation.

[lxxxi] In original, not "of foreigners"; "as foreigners."

[lxxxii] The translation: "Examples are to be found in the history of the Sabines, Albans, Latins, and other Italian peoples; until, at last, 'Caesar in his triumph led the Gauls, and into the Senate, too.'" *JBP*, 3.15.3.1.

LS: And so on. There was a Roman empire, all right, but what he has in mind is they were in a way destroying peoples; the individuals acquiring more or less citizenship of Rome accepted that. The alternative is paragraph 4.

Reader: "Another form of moderation in victory is to leave to the conquered kings or peoples the sovereign power which they had held."[lxxxiii]

LS: This seems to be Grotius' preference. See the beginning of paragraph 7.

Reader: "Moreover, to leave to the vanquished their sovereign powers is not only an act of humanity, but often an act of prudence also."[lxxxiv]

LS: Now the great question comes in. There is an alternative: you don't destroy their state and you don't leave it exactly as it is, but you change the regime. We have so many examples in our time, especially in Eastern Europe. Paragraph 8.

Reader:

> The Lacedaemonians, and, at first, the Athenians, claimed of themselves no sovereignty over the cities they had captured.[lxxxv] They wished merely that these should use form of government modeled on their own;[lxxxvi] the Lacedaemonians, a government in fact under the aristocrats,[lxxxvii] the Athenians one subject to the will of the people, as we learn from Thucydides, and even from Aristotle himself, in the Fourth Book of his *Politics*[lxxxviii]—

LS: Omit the quotation of the comedy.

Reader:

> A similar course is that which, according to Tacitus, was pursued by Atabanus at Seleucia; "He placed the commons under the aristocracy,"[lxxxix] "in accordance with his own interest: for the rule of the people is close to liberty, but the despotism of the few is nearer to the life of the king."[xc] But the question whether changes of this sort make for the safety of the conqueror does not belong to our investigation.[xci]

[lxxxiii] In original, not "to the conquered kings"; "to conquered kings." *JBP*, 3.15.4.1.
[lxxxiv] *JBP*, 3.15.7.1.
[lxxxv] In original, not "of themselves"; "for themselves."
[lxxxvi] In original, not "should use form of government"; "should use a form of government."
[lxxxvii] In the translation the phrase is "the Lacedaemonians, in fact, a government under the influence of the aristocrats."
[lxxxviii] Kelsey has "as we learn from Thucydides, Isocrates, Demosthenes, and even from Aristotle himself in the Fourth Book of his *Politics* chapter 11, and the Fifth Book, chapter 7."
[lxxxix] Grotius here adds "he says" in reference to Tacitus.
[xc] In original, not "the life of the king"; "the license of a king."
[xci] *JBP*, 3.15.8.

LS: But it seems nevertheless that although he doesn't express attachment, he expresses an inclination to not interfere with regimes. Paragraph 10.

Reader: "But when all sovereignty is taken away from the conquered with respect to their private affairs and public matters it is still possible to leave to them their own laws, customs, and officials."[xcii]

LS: Here is a note to this passage which you have just read. There is a statement regarding the action of the[23] [Romans]. And where the expression "a shadow of liberty shall at least be left" occurs.

Reader: "Such was the shadow of liberty among the Greeks under Roman rule."[xciii]

LS: In other words, that is another extension of the same sort. Beginning of paragraph 11.

Reader:

> A part of this indulgence is not to deprive the conquered of the exercise of their inherited religion, except by persuasion. This Agrippa, in his speech to Gaius,[xciv] which Philo quotes in his report of his embassy, proves to be as devoid of harm to the victor as it is gratifying to the vanquished. In Josephus, both Josephus himself and the Emperor Titus reproach the rebels of Jerusalem with the fact that, through the generosity of the Romans, the rights they enjoyed in the exercise of their worship were so complete that they could exclude foreigners from the Temple[xcv]—

LS: In other words, since it is part of an indulgence it is not a strict obligation. I admit that. The heading of the first paragraph of the next chapter.

Reader: "*Internal justice requires that the things which are taken from an enemy in an unlawful war shall be restored*"[xcvi]

LS: "Internal justice." A first attempt at cataloguing these things, which of course could only be the first attempt, would be to go through the chapter headings and see where internal justice begins to appear. Paragraph 3, section 2.

Reader:

[xcii] In original, not "private affairs and public matters"; "private affairs and minor public matters." *JBP*, 3.15.10.
[xciii] *JBP*, 3.15.10 (n. 4).
[xciv] This name is marked inaudible in the original transcript.
[xcv] This selection concludes with the words "even upon pain of death." *JBP*, 3.15.11.1.
[xcvi] "*Moral justice requires that the things which our enemy has taken from another in an unlawful war shall be restored*" is Kelsey's translation of the paragraph heading. Again, Strauss prefers the more literal internal justice for *interna justitia. JBP*, 3.16.1.

> Again we are not to attribute to any other cause the arrangement which the king of Sodom proposed to Abraham, that he should return the prisoners,[xcvii] but keep the other things for himself in return for toil and danger.[xcviii] Abraham, however, being a man not only of a pious but also of a lofty mind, wished to take nothing at all for himself; but from the things he had recovered as though by his own right he gave a tenth to God,[xcix] deducted the necessary expenses, and desired that a share be assigned to his allies.[c]

LS: Now in the note here he gives similar actions to those of Abraham by pagans. Now this must be understood in this way. Pagans did it; hence this does not presuppose knowledge of a divine law: it belongs to natural right in the wider sense of the term. But it has of course possibly the other implication: that the thing which played a great role in the discussions of the seventeenth and eighteenth century, that the virtues of the pagans are not simply, according to a famous saying of Augustine, splendid vices.[ci] That may also play a role. This would need to be studied more closely.

A few more words in the next chapter. Read the first paragraph.

Reader:

> It might seem superfluous for us to speak of those who are not involved in war, it is quite clear that no right of war is valid against them.[cii] But since in time of war on the pretext of necessity many things are done at the expense of those who are at peace, especially if they are neighbors, we must briefly repeat here what we have said elsewhere, that the necessity which gives any right over another's property must be extreme; furthermore, that it is requisite that the owner himself should not be confronted with an equal necessity; that even in case there is no doubt as to the necessity more is not to be taken than the necessity demands; that is, if retention is sufficient, then the use of the thing is not to be assumed; if the use is sufficient, then not the consumption; if the consumption is necessary, then the value of the thing must then be repaid.[ciii]

LS: The key point: Necessity gives me a right to something which belongs to somebody else, provided its owner is not under an equal necessity. That is clear as far as it goes, but then consider the two men on the raft. They both are in an equal necessity.

[xcvii] In original, not "return the prisoners"; "restore the prisoners."
[xcviii] In original, not "in return for toil and danger"; "in return for his toil and danger."
[xcix] In original, not "he had recovered"; "that were recovered (for this narrative, as we have said, relates to them)."
[c] The word "deducted" is marked inaudible in the original transcript. *JBP*, 3.16.3.2.
[ci] Augustine is reputed to have made this remark; it does not appear in his writings, though it is implied. See, *e.g., City of God*, part 19, Bk. 25.
[cii] In original, not "it is quite clear"; "since it is quite clear."
[ciii] Kelsey has "if consumption is necessary, the value of the thing must then be repaid." *JBP*, 3.17.1.1.

In the same chapter, paragraph 2, section 4, the second half after the quotation.

Reader:

> No one should think that, while it is fine to say these things, it cannot be carried into effect;[civ] for neither would a Divine Man earn them,[cv] nor the wise office of laws prescribe them,[cvi] if they believed that such rules could not be enforced. In fact, we must grant that that can be done which we see done.

LS: Which we see has been done.

Reader: "Therefore we have deduced examples,[cvii] to which may be added the notable example[cviii]—"

LS: That is all we need. Now you see here he gives in passing the most important justification for his use of historical examples, namely, the examples prove the possibility of doing something which we are obliged to do. The simplest and most convincing possibility is truly example, now in the double sense. When we say example is more than preaching—do it, and then you see it can be done.

Now here is a very important point throwing light on this great change which has taken place in the last century. Examples cannot possibly be available for entirely novel demands. Of course, a tacit premise of the older view was that moral rules don't change, therefore you can expect to find examples in the past. But if you think of any example—unfortunately none occurs to me regarding novel demands—say, to bring up children without any punishment, without any rebukes, perhaps without any restraint, can nevertheless lead to a good generation, we wouldn't find examples. So the experimenting in morality has this peculiarly risky character.

Now the fundamental problem is this. Is there a human nature which as such would always be effective, if in different degrees, and is this human nature the only solid basis for establishing rules of conduct, or not? In the former case, there is in principle the possibility of unchangeable morality, but if you want to have a changing morality for one reason or another, moral progress, progress not only in having more moral actions or better moral actions than before, but higher principles than previously known, then it cannot be based on the unchangeable nature of man. You would need[24] entirely different criteria. Now the man who tried this first was Kant, and Kant rejected the notion that morality can be based on the nature of man.

[civ] In original, not "it cannot be carried into effect"; "they cannot be carried into effect."
[cv] In original, not "for neither would a Divine Man earn them"; "for neither would the Divine Man urge them."
[cvi] In original, not "office"; "authors."
[cvii] In original, not "deduced"; "adduced."
[cviii] *JBP*, 3.17.2.4.

I believe we should call it a day at this point.

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[1] Deleted “[inaudible].”
[2] Deleted “[inaudible].”
[3] Deleted “[inaudible].”
[4] Deleted “mandate.”
[5] Deleted “[inaudible].”
[6] Moved “pushed.”
[7] Deleted “of.”
[8] Deleted “that.”
[9] Deleted “Rousseau.”
[10] Deleted “he.”
[11] Deleted “in terrum.”
[12] Deleted “is not as.”
[13] Deleted “is that.”
[14] Deleted “Xenophon.”
[15] Deleted “the.”
[16] Deleted “the.”
[17] Deleted “and.”
[18] Deleted “the.”
[19] Deleted “the.”
[20] Deleted “under.”
[21] Deleted “book.”
[22] Deleted “long.”
[23] Deleted “[inaudible].”
[24] Deleted “an.”

Session 14: November 19, 1964

Leo Strauss: [i]This is our last meeting, and let us remind ourselves again of the fundamental issue, by which I do not mean necessarily the issue as Grotius saw it but as we would see it. (To some extent Grotius saw it, of course.) Is there such a thing as natural right? There is the positive and negative reply. According to Carneades [there is not, and], we can add Machiavelli and some others to the negative reply. Another formulation of the same view is that there is a natural right, but it is a natural right of the stronger.

Student: Can you make it more explicit what Carneades says?

LS: Carneades says simply that there is no natural right.[ii] All right is of conventional origin, so men agree on something and expect everyone to abide by it. It is a very inadequate doctrine, but we must admit we do not have any writings of Carneades left. We are dependent on a few reports in Cicero. And we have similar views presented by the so-called sophists in the Platonic dialogues, but we do not have a complete presentation of this position, which is in my opinion untenable, but still we would have to know it in its entirety in order to judge fairly. I have tried to present the argument going beyond the explicit and trying to fill up the[1] [gaps], and that is in chapter 3 of my *Natural Right and History*, but surely that it is in need of many revisions.

But the issue is in general clear, and whether it is an intelligible assertion or not: some people say there is natural right; and others say there is no natural right—all right is man-made. This latter assertion is intelligible today, this is the present view of today's social sciences. Do you not know that? How long have you been studying political science?

Student: Since October.

LS: Oh, then you will be informed shortly. The predominant view today is that there is no natural right. There are all kinds of conceptions of right, differing from society to society, from class to class, and people act then more or less consistently on their notions of right, but they do not necessarily mean that men made them, that they are sitting together and figuring out what they would agree upon, and come out as it were spontaneously. Still, this is today the common view of a large majority of social scientists.

But our analysis of Grotius would be incomplete if we would leave it at this and look at the problem within this horizon, because there is a divisive issue within natural right, and that is that of the pre-modern natural right[2] [as against the] natural right which was ushered in by Hobbes. This we have to take up immediately. Grotius of course did not

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[i] The original transcriber indicates that the session began with the reading of a student's paper. The reading, and apparently the subsequent discussion, was not recorded.

[ii] Carneades is used by Grotius as the mouthpiece for this argument in the Prolegomena. Strauss discusses this in session 1.

know modern natural right because it came in after his time. That is not quite correct—someone reminded me of the fact that Grotius had read Hobbes's *De cive*. Can you find the passage and read it?

Student: This is in a letter to his brother dated April 11, 1643.

LS: *De cive* appeared in 1642.

Student: He writes: "My brother, our interpretations of prophetic passages in the reading of the Bible we will affirm for the time being. Meanwhile, I ask friends to suspend their judgment. I have seen the book, *On the Citizen*, and those things are pleasing which the author speaks in behalf of kings. The fundamentals, however, on which he constructs his thoughts I cannot accept. He argues that war exists by nature among all men and holds other such views not harmonious with our own, for he believes in the duty of the private citizen to follow the religion accepted in the country, if not by assent, at least by compliance. These and other such things I cannot accept. I do not consider the book to be venal, but prying. I will be glad if the cause of the king is thus defended, as it ought to be, on which subject I have written some appropriate remarks."

LS: So in other words, Hobbes is absolutely, to put it mildly, not unacceptable to Grotius. But the fundamental theoretical foundations he does not like. It is not very revealing, but for[3] [present] purposes it is sufficient.

So Grotius did get an inkling of this new thing. It is important to realize that Hobbes cannot possibly[4] [be identified] with Carneades, Carneades now as the representative of the rejection of natural right. In the older literature that is frequently done, that they don't see the differences in Hobbes and Carneades. Hobbes is[5] [a] natural right teacher, there is no question.

Among many passages, I thought we might read a section from chapter 15 of the *Leviathan*.

Reader:

> The fool has said in his heart there is no such thing as justice, at sometimes also with his tongue,[iii] seriously alleging that every man's conservation contentment being committed to his own care,[iv] there could be no reason why every man might not do what he thought conduced thereunto—

LS: That is the view of Carneades.

Reader:

[iii] In original, not "at sometimes"; "and sometimes."

[iv] In original, not "every man's conservation contentment"; "every man's conservation and contentment."

> and therefore also to make or not make, keep or not keep, covenants was not against reason when it conduced to one's benefit. He does not therein deny that there be covenants; and that they are sometimes broken, sometimes kept; and that such breach of them may be called injustice, and the observance of them justice; but he questions whether injustice, taking away the fear of God (for the same fool has said in his heart, there is no God) may not sometimes stand with that reason which dictates to every man his own good—

LS: In other words, prudence, taking care of one's benefits, is not justice and has nothing to do with justice. Sometimes it is wise to be just, but there are also occasions where it is imprudent, and the guiding virtue is not justice but prudence. That was already said[6] [by] Carneades.

Reader:

> and particularly then, when it conduceth to such a benefit as shall put a man in a condition to neglect not only the dispraise and reviolence,[v] but also the power of other men. The kingdom of God is gotten[vi] by violence, but what if it could be gotten by unjust violence? Were it against reason so to get it, when it is impossible to receive hurt by it? And if it be not against reason it is not against justice, for justice is not to be approved for good.

LS: Justice is bad because it runs counter to your benefit.

Reader:

> From such reasoning as this, successful wickedness has obtained the name of virtue; and some that in all other things have disallowed the violation of faith, yet have allowed it when it is the getting of the kingdom. As the heathen that believed that Saturn was disposed by his son Jupiter believed nevertheless the same Jupiter to be avenger of injustice,[vii] somewhat alike to a piece of law of Cook's Commentaries on Littleton; where he says if the right heir of the crown be attainted of treason, yet the crown shall descend to him:[viii] from which instances a man would be very prone to infer that when the heir inherited the kingdom,[ix] shall kill him that is in possession, though his father, you may call it injustice, or by what other name;[x] yet it can never be against reason, seeing all the voluntary actions of men attend to the benefit of themselves; and those actions are most

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[v] In original, not "reviolence"; "reviling."
[vi] This word is marked inaudible in the original transcript.
[vii] In original, not "disposed"; "deposed."
[viii] In original, not "shall descend to him"; "shall descend to him and *eo instante* the attainder be void."
[ix] In original, not "the heir inherited the kingdom"; "the heir apparent of the kingdom."
[x] In original, not "or by what other name"; "or by what other name you will."

> reasonable that conduce most to their ends. This specious reasoning is nevertheless false.[xi]

LS: In other words, Hobbes comes down on the side of the angel. This is a[7] [fact] which has been grossly neglected. But this is a new kind of natural right, and the content of it is very different. One can describe Hobbes's relation to Carneades as follows. Carneades believed to have proven the impossibility of natural right by the case of the two men on the plank. Here is a case where justice has to be silent, and he contended that this shows the essential limitations of justice. Hobbes draws exactly the opposite conclusion. He says this proves that there is justice, because why do we say we can't decide it? Because both are concerned with nothing but their self-preservation. This is unblameable. It is absolutely just. In other words, whereas according to the traditional natural law there could not be a conflict ultimately regarding right, there can be a conflict regarding right in Hobbes. But it is a conflict regarding right and not mere interest, mere utility. All wars can be just according to Hobbes, and only one side can be just according to the other view.

But this point, to snatch victory from defeat, turn it around:[xii] this has its grand parallel, its much more famous parallel, in Descartes. Descartes wanted to have knowledge, and there were people around who said there cannot be knowledge for one reason or another. They are traditionally called the skeptics. And Descartes looks at the skeptical attitude and says: Very good, very good, but they don't prove what they mean to prove because if you look at them and grant them everything, you find out an[8] absolute certainty, absolutely certain knowledge at the bottom of all this stuff: the certainty of the "I" that doubts—I am. I could not possibly know of my ignorance if I did not know that I am, so much so that a deceiving demon who would deceive mankind in all respects would still presuppose the existence of the being to be deceived, and this being to be deceived has one ultimate[9] [tool]: suspicion, distrust of what this evil demon might[10] [place in his mind].[11] Then he is in a miserable condition but at least he can prevent deception, which for man concerned with knowledge is the most important thing.

The way in which Hobbes counters moral skepticism is a strict parallel to the way in which Descartes counters theoretical skepticism. Therefore, Descartes' result was the thinking ego in contradistinction to God as the primary thing. Correspondingly, in Hobbes the primary certainty from which all moral and political reflection starts is not the law of nature but the right of the ego, the fundamental right of self-preservation. So this is a radically different understanding of natural right.

The more specific question we address to Grotius is this: Where does Grotius stand regarding this issue, this watershed between pre-Hobbean natural right and Hobbean natural right? [For Grotius], man is by nature a social animal, that is unquestionable. If there are some points where this great edifice of traditional natural right is being shaken or already shaken in Grotius, that may be so, but he surely did not visualize a new

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[xi] Hobbes, *Leviathan*, chap. 15, para. 4.

[xii] That is, draw a defense of justice from an apparent refutation of justice.

foundation. In simple journalistic expression: Grotius was not a revolutionary. He continued the tradition.

Student: [Inaudible]

LS: That is clear, there was something in the air and he detected it, but that surely had not penetrated to his consciousness. You compare the crucial sections of the *Prolegomena* [of Grotius' book] with the epistle dedicatory of Hobbes's *Elements of Law*, when he says [that] hitherto all these cases of natural right have been built in the air and now we must find a new foundation, and then you see the difference immediately.

Student: Would the letter that was read earlier indicate not only that Grotius did not take that step, but saw Hobbes taking it and refrained from doing it?

LS: That wouldn't appear from this letter.

Student: The letter says he's prying, and what else would Hobbes be prying into?

LS: Grotius didn't write English letters, so we would have to see it either in Dutch or in Latin, and then we would see what he means. What does prying mean—searching?

Student: Prying can mean prying into affairs that shouldn't be pried into, like someone else's business.

LS: In other words, he is a bold man. Hobbes was a black sheep, we know that. In other words, Hobbes was not a flatterer of kings. Does he mean that?

At any rate, you must not forget how books are read. Grotius was how old at that time? In the fifties at least, and a very big shot, what they call now a pundit. And he reads this book by a completely unknown man. Was *De Cive* anonymously published? I do not know at the moment. And he reads it and then he looks at this young man who was already also fifty and sees [a teaching that is] in some respects surely quite sound, but he goes a bit too far in his giving power to the secular authorities regarding the church. It is a bit too far right in this respect, if we apply this simple schema. And then of course the starting point: fear and not benevolence is the foundation of all lasting societies. That's quite terrible and unacceptable, but since it leads up to such a pleasant view as favorable to kings, he won't take it too seriously. It is like the *National Review* not minding atheists in the case of Ayn Rand so much because she comes up on the side of capitalism.

So in other words, the statement lacks any profundity as regards Grotius, but not entirely uninteresting, surely. Hobbes, I believe, never mentions Grotius, and he probably would have said something similar, like he codifies all kinds of absurd[12] [agreements].

Student: You said before that the ancients never spoke of rights, they spoke of duties.

LS: It all depends. That was a sweeping statement. But go on.

Student: Last time you were talking about Socrates in the *Apology*—

LS: I know what you mean, when he says I am just in defending myself.

Student: He doesn't say: I have a right.

LS: It is undecidable whether he means I am entitled to do it or I am obliged to do it.[xiii] The concern with the distinction between rights and duties is something which is relatively recent. Whatever may be the situation in legal practice, that it reaches philosophic heights and becomes philosophically relevant, that is an interesting thing.

When you read the sections of the *Summa* and the key discussions of natural right and natural law and this *prima* and *secunda naturae*, there is not a reference to right as distinct from duty.[xiv] Later on they speak about that, but also because they are somewhat closer to legal practice than the *Summa* is. But the key point is this: whether rights are the starting point of the whole reflection, or duties. Do you see that? Does it make any difference whether you claim any rights for the sake of your duties, and then the duties limit the rights? Or take in everyday practice, the right of freedom of speech, if it is claimed, say, because it is necessary to have freedom of speech because otherwise the public officials would misuse their authority and this kind of thing: clearly this legitimation of freedom of speech limits it also. There is no possible excuse for pornography on this ground. But if you have an absolute variety of freedom of speech, then that covers also pornography. So generally, starting with absolute rights as distinct from duties begins with Hobbes.

The right to self-preservation cannot be questioned by anybody. It has the same status as the right of freedom of speech or any of these other liberties have according to the present liberal views. Whatever the defects or virtues of present-day liberalism, this fades into insignificance compared to the fact of [its] fundamental moral orientation, which is[13] [underpinned] also by a specifically modern doctrine.

Student: In other words, you are saying that Grotius still has duties on his mind.

LS: There is no question of that, but since he writes a book of a largely legal character then the distinction of course is quite important, and he gives this explicit discussion of[14] [*ius*] as *facultas morales*, moral faculties.[xv] There is of course right as distinguished from duty, but this concept of right in contradistinction to duty is relatively recent, not in[15] [the older understanding of *ius*]. When you speak of the *ius*[16][*utendi*], the right to use, they mean of course that, but whether this reaches the level of thematic discussion, right as distinguished from duty, is still the question.

[xiii] See Plato, *Apology of Socrates* 18e-19a.
[xiv] *Summa Theologica*, 2.1.90-97.
[xv] *JBP*, 1.1.4-5.

Surely the key point is the order of rank, what comes first. And the familiar phrase, there cannot be rights without duties, which came in the nineteenth century, is properly quite good, but theoretically it can be very misleading because there will always be a difference of emphasis. Traditionally speaking, it is of course not true that there are no rights without duties. God has no duties but has rights.

Student: Could you clarify what the role is of the notion of property in the pre-modern formulation of natural right?

LS: That is complicated. How shall I say it as simply as I can? We have an example of this point: the question of social contract. This existed prior to Hobbes and after Hobbes, and therefore this is in a way a concept neutral to the difference between moderns and ancients. The same is true of property. The fundamental issue regarding property can be stated very simply. Communism, natural or not—both views were pre-modern. But then you have to raise the question: How did the modern orientation affect the property issue nevertheless? And here we have a simple possibility of comparison.

The classic statement[17] favorable [to] property is Aristotle's *Politics*, Book I.[xvi] Now the modern teacher regarding property is John Locke much more than Hobbes, but compare Locke and Aristotle regarding property and then you see the crucial difference. For Aristotle, private property is absolutely necessary for the developing of society, but there is, as you know, no right of unlimited acquisition. That is[18] undesirable in Aristotle. Locke is in favor of the right of unlimited acquisition. One has to study the fifth chapter of *Civil Government* with a bit of care to see it. Here we have it. This right of unlimited acquisition is something novel, and it has something to do—and that is of course the key point—it has something to do with the specific difference between modern and pre-modern natural right. That would lead me now too far. I must only say now that the right of unlimited acquisition of property as Locke sees it is theoretically deduced from the right of self-preservation as the sole natural right. That is the connection.

When you take much later communist doctrines as they have developed in the nineteenth and twentieth centuries, they are of course against private property, but the question is whether there is not some crucial element in common to Locke and Mao in contradistinction to Aristotle, Plato, and so on. It has something to do with *infinity*. In infinite acquisition, no limits in an infinite progress towards the ever-perfect actualization of each man's potentialities and so on, that would lead very far now to develop that. It is not enough simply to take out one or the other topic, which was discussed both before and after the watershed. Some of them have not been affected; others have.

In a chapter on Locke which I once wrote, I quoted a passage which[19] [is] bodily taken, so to speak, is lifted by Locke from Cicero's[20] *Offices*, about what enters the making of a noble right.[xvii] What does Locke prove or wish to prove by this example, and what does

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[xvi] Aristotle, *Politics* I.4. 8-11. See also Aristotle's critique of Platonic communism in *Politics* II.5.

[xvii] Possibly a reference to the section on Locke in *Natural Right and History* (Chicago: University of Chicago Press, 1953), 237.

Cicero wish to prove by this example? Cicero wishes to prove the necessity of human cooperation, and Locke wants something very different: I think it had to do with the virtues of exchange, barter, money. The division of labor but from a very different point of view. In other words, Cicero looked at the division of labor as a sign of men's cooperation, Locke from a different—I'm sorry I do not have such a good memory to tell you.

Now we must really turn back to Grotius. What is Grotius setting out to do? We can say that's very simple, the codification of the right of war and peace and of all right which has any bearing on the right of war and peace and acquisition of property, like sovereignty. But this is not the only intention of Grotius, as we have seen. He is also concerned with reducing the right of nature to the status of an art, because of the immutability of the right of nature. This, taken by itself, would lead to something like an ethics, geometrically demonstrated, wholly independent of any reference to human making, but of course Grotius is very far from it.

Grotius is especially concerned with right strictly understood, by which he understands this sphere of commutative justice, a part of morality—one can say the minimum demands of morality, in contradistinction to such a thing as humanity, charity, etc. Now this right strictly understood, as all natural right is of course strictly understood, [stands] in contradistinction to volitional law, human or divine. Volitional law, dependent on an act of the will of the lawgiver, demands both less and more than natural right. That it demands both more and less than natural right is true especially of the *ius gentium*. *Ius gentium* is in some respects more humane.

The broader subject which we encounter all the time is the question of the just war, and this has very much to do with the distinction between natural right and *ius gentium. Ius gentium* abolishes the difference between the just and the unjust war, but according to natural right this concept must be preserved.

I will leave these general remarks because we must look at our assignment today. Perhaps we begin with chapter 18.

Reader:

> What I have heretofore said applies chiefly to those who either possess the supreme command in war or are carrying out public orders. We must also consider what is permissible for an individual in war, not only according to natural and divine law, but also according to the law of nations.

LS: According to the right of nature, according to divine right, according to *ius gentium*. We must see what each of these bodies of right prescribe.

Reader:

> In his first book *On Duties*, Cicero says that the son of the Censor Cato had served in the army of the general Pompilius, but that the legion in which he was serving was disbanded; nevertheless, since the youth from

> love of warfare remained in the army, Cato wrote to Pompilius that he ought to oblige the young man to take the military oath a second time, if he wished him to remain in the army. Cato gave as a reason that after the first oath had been cancelled his son could not lawfully fight with the enemy. Cicero adds the very words of Cato from a letter to his son, in which he warns the youth to avoid engaging in battle, for the reason that it is not right for one who is not a soldier to fight with an enemy.[xviii]

LS: What kind of right is that? Let us read the beginning of the next section.

Reader:

> But those are deceived who think that the principle just stated has its origin in the law of nations.[xix] This becomes clear if you consider that, just as anyone is permitted to seize the property of an enemy, so also, as we have shown above, it is permissible to kill an enemy. For according to the law of nations enemies are held to be entitled to no consideration. The advice of Cato, therefore, comes from Roman military discipline[xx]—

LS: And that is municipal law. But why is it not natural right?

Student: It would depend on whether the war were just or not. If it were just, then he could lend his aid to the punishing of a criminal even without being in the army.

LS: So in other words, the distinction between soldiers and civilians is not the requirement of natural right. You can easily see what great consequences it has for Rousseau—Rousseau's humane distinction between soldiers and civilians. That civilians must [not] be touched presupposes this distinction between civilians and soldiers in the first place, a distinction which is not necessary. There may very well be a situation in which everyone has to fight. Those who are unable to fight because of old age or because they are too young, that's another matter. But the distinction would not apply.

Student: Is there any possibility that there could be a kind of natural law understanding based upon natural sociability of man toward man rather than based upon a kind of humanitarian understanding of sociability, which would override a difference between one citizen of one state and another citizen of another state. So that it would only be when serving the state for a particular purpose that this obligation to other men could be overcome. It would seem to me if there was that broad understanding of sociability, one would be reluctant to fight even a so-called enemy without the sanction of municipal law. Is it proper to look at sociability that way?

LS: Did you say sociality?

Student: Sociability.

[xviii] Cicero, *On Duties* I.11.36, alluded to in *JBP*, 3.18.1.1.
[xix] In original, not "just stated"; "thus stated."
[xx] *JBP*, 3.18.1.2.

LS: But what does it mean? It has obviously these two sides. In the first place, there is a kinship among all men as men. It[21] [has] also this [other side, which] for certain reasons[22] Grotius does not develop: men form societies distinguished from other societies. Both sides belong to man's sociality. The difficulty is this: that since there are these particular societies and therefore the possibility of war among them, how to adjust the humanity deriving from the kinship of all men with the qualified humanity which is compatible with war. Is that not the situation? That we cease to talk politically relevant things[23] if we disregard this complication, and simply say that states, particular states with borders, are deplorable things and disregard them—that is Grotius' point, and even from the Christian point of view[24] the right of warfare must be admitted.

Student: Is there a difference[25] [between] the sociability understood by Cicero and the Romans and sociability as understood by the Greeks?

LS: That is often said, but I don't see any basis for that. The trouble is partly that we have the body of Roman law and we do not have such bodies of Greek law, and therefore there is a lacuna on the Greek side, and people say that the Greeks were not simply a law-minded people in the way in which the Romans were. I think that is simply an unreasonable conclusion; one only has to read the Greek books to see that the Greeks were very much concerned with law and its virtues.

Student: There is an emphasis which the Romans place on duty.

LS: I don't believe . . . if there should be some minor difference of emphasis; no.

Student: [Inaudible]

LS: But they are very closely connected. I mean the household or the family is only the smallest unit.

Student: But Aristotle spoke of a political . . . .

LS: He also spoke of the other thing in a passage in the *Ethics*, in the Eighth Book or thereabouts, that man is primarily[26] [philanthropic].[xxi] Some people believe it is a great difference, as someone says a man is by nature a social being, or man is by nature a political being. In the Aristotelian tradition that does not make any difference.

[change of tape]

Student: On this question between a civilian and a soldier: in terms of natural law teaching, wouldn't there be a difference in Grotius, based on natural law because, after all, if one is conducting a just war, one could always punish the people in authority or the people who got directly in one's way?

[xxi] Aristotle says in *Nicomachean Ethics* (Bk. VIII, chap, 1) that human beings are "friends of mankind" (*philanthropoi*).

LS: But who is doing the punishing? Why is it necessary for the punishing society to divide itself into two parts, the fighting part and the non-fighting part? You had reasons why pregnant mothers and babies and very old men are not very useful for that, but otherwise?

Student: No one has a right to kill a member of the punishing society because say the punishing society is waging a just war, so the only people who can be justly killed are the ones in the[27] [punished] society.

LS: Here the question of Cato's son—he was a member of the punishing society. Is this son permitted to wage war? Of course there is no question: for natural right, that it is permitted. The question arises only on the basis of Roman municipal law, because it says you must re-enlist if you serve beyond that time.

Student: I wasn't thinking so much of who can wage war, but of who can be harmed. In other words, there is no reason why[28] [under] natural law [you] can harm someone on the other side who wasn't either a soldier and preventing your just action, or a member of the government.

LS: But still there is the difference between actually resisting men or women, for that matter, and non-actually resisting men, and soldiers and civilians. That is an obviously different distinction. The uniform—why do they have the uniform? One reason is to make clear whether they fight or, whatever they do, they are members of the fighting force and are to be treated differently than the others.

Student: But still, that's not so very different than the distinction between civilians and common[29] [soldiers].

LS: But look at the partisans who are not recognizable as soldiers, and of course it is perfectly true that one may shoot these partisans at sight if you know that they are partisans. But you don't know that, and the difference is exactly because they are not soldiers. The fundamental question involved is this: Is the division of a people into a visibly fighting part and a visibly non-fighting part necessary from the point of view of natural right? And that is I think denied by Grotius and taken for granted, perhaps too much taken for granted by Rousseau in his natural right regarding war.

Student: But still, on the simply Grotian basis,[30] there would be some people who would be clearly non-fighting people, and on a natural right basis as well.

LS: I would never have thought of this question. I admit this lack of thought on my part, if Grotius hadn't forced me to think of it.[31] [Let us] not introduce any thought here which is not imposed upon us by Grotius, by his quotation of this remark of Cato. Let us read in chapter 19, paragraph 1, the end of section 1.

Reader:

> In his fourth speech *On Leuctra* Aristides says: "Those who are devoted to justice are especially revealed in the maintenance of peace and other public agreements." As Cicero, in fact, rightly declared in his *On Ends*, there is no one who does approve and praise the quality of mind[xxii] by which not only is no advantage sought but good faith is cast even to one's disadvantage.[xxiii]

LS: The key point here is strictly anti-utilitarian. As long as you are concerned with your utility, you may be reasonable nevertheless, but this is not strictly speaking morality. In other words, it may not be immoral [simply to pursue your own utility]. That is the great difference between utilitarianism and the classical tradition. The problem is not as simple as that, as would appear from a passage in the Prolegomena which I cannot now identify, and there is of course some utility involved in morality.[xxiv] Honesty is the best policy, this kind of thing. Therefore, this would require a somewhat deeper study. There is a difference between long-range utility and short-range utility: the short-range which surely is limited to your lifetime; the long-range where you take into consideration your offspring or the offspring of your offspring, or the utility of the human race. At any rate, whether long-range utility is the same as morality is an open question, but that long-range utility comes closer to morality than short-range utility is, I believe, easy to see.

Now in Thucydides' historical work this plays a role, but not in these terms, when Thucydides praises moderation.[xxv] It is clear that this is more than mere calculation, but it is not clear whether it is not identical to long-range utility. I submit this as a question which is worth going into. Let us turn to paragraph 2, the same chapter, the first section.

Reader:

> Already in our previous discussion we have said that we ought not to accept the principles laid down by Cicero: "We should have no relations with tyrants, but rather the most absolute separation"; again, "A pirate is not classed into a number of regular enemies;[xxvi] with him there is no bond of good faith, since he does not respect a common oath."[xxvii]

LS: That is all we need—I'm sorry, go on.

Reader:

> Seneca, too said of the tyrant: "When the relationship of human rights was broken off, every bond, that bound him to me, was severed."

[xxii] In original, not "no one who does approve"; "no one who does not approve."
[xxiii] In original, not "cast"; "kept." Cicero, *On Ends* 5.12.63 referenced in *JBP*, 3.19.1.1.
[xxiv] Prolegomena, 19-22.
[xxv] Many passages in Thucydides point in this direction. See, *e.g.*, III.42-48, VIII.24, VIII.97.
[xxvi] In original, not "into a number of regular enemies"; "in the number of regular enemies."
[xxvii] In original, not "'since he does not respect a common oath'"; "'and he does not respect a common oath.'"

> From such a source arose the error of Michael of Ephesus, who in his commentary on the *Nicomachean Ethics* said that the violation of the wife of the tyrant did not constitute adultery.[xxviii]

LS: Violation—that must be probably[32] [different from] rape—if some one has an illicit relation without any violence.

Reader:[xxix] "Certain teachers[xxx] of the Jews have made a similar statement about foreigners, whose marriages they considered void."[xxxi]

LS: Grotius takes a much stricter view than Cicero and also than Seneca:[33] good faith is to be kept with everyone. Cicero and so on is lax compared with Grotius. Good faith is absolutely sacred. How come Grotius is here so strict? I believe according to our present notion, a cop not keeping faith with a very dangerous murderer—we would still not like the idea that we deceived him, but it is a moot question. Why is Grotius here stricter than Cicero and Seneca especially?

The remark of Michael of Ephesus is very remarkable because [of] Aristotle's mention of adultery in the Second Book of the *Ethics* among the things which are bad under all conditions. But on the other hand, we know also that Aristotle's own natural right is changeable. I thought always that this passage in the Second Book of the *Ethics* has to be interpreted in the light of the remark in the Fifth Book, that all natural right is changeable.[xxxii] Not exactly in this way, because someone should have fun at the expense of this terrible tyrant, but rather that there might be public necessity overriding such considerations, like extinction of a royal house leading in all probability to a civil war, and the only way to prevent it is to get offspring, and perhaps the only way to get it is the king, being stubborn, being a secret affair of the queen with someone else, assuming the king to be impotent. But now I find here Michael of Ephesus on my side, though not exactly in the way in which I meant it.

I think the point is this. In the seventeenth century there was a great problem regarding not tyrants but heretics. Is faith to be kept with heretics? This was a controversial issue. It is very interesting that Grotius doesn't say a word about that issue. This is one of the silences of Grotius, as we have seen others.

Student: He said before that men were supposed to keep faith with men of different religions.

LS: Heretics is not exactly the same as different religions because different religions means already the recognition that these are not mere heretics. Let us turn to chapter 20, paragraph 5, sections 2 to 3.

[xxviii] In original, not "the tyrant"; "a tyrant."
[xxix] "By a like error" begins the sentence in the translation.
[xxx] This word is marked inaudible in the original transcript.
[xxxi] *JBP*, 3.19.2.1.
[xxxii] *Nicomachean Ethics* II.6, V.7.

Reader: "In order, therefore, that the undivided sovereignty be transferred in a valid manner,[xxxiii] the consent of the whole people is necessary. This may be effected by the representatives of the parts which are called the estates."

LS: Estates of the realm, of course.

Reader:

> validly to alienate any part of the sovereignty there is a twofold consent needed,[xxxiv] that of the whole body, and in particular the consent of that part of which the sovereignty is at stake, since without its consent it cannot be separated from the body to which it has belonged.

LS: Say, Alsace-Lorraine cannot be severed from Germany or France or whatever country it just happens to belong [to] without its own consent.

Reader:

> Yet in case of extreme and in other respects unavoidable necessity the part itself will probably transfer the sovereignty over itself in a valid manner without the consent of the whole people, because it is to be believed that that power was reserved when the body politic was formed.
>
> In patrimonial kingdoms, however, there is nothing to prevent a king from alienating his crown. Yet it may happen that such a king would not be able to alienate a part of the sovereignty, if indeed he has received the kingdom as his property on the condition of not dividing it.[xxxv]

LS: You know what a patrimonial kingdom is: an absolute monarchy in the strictest sense. The kingdom is the property of the king or of the royal family. Here we have Grotius' equivalent to the self-determination of nations. We see that he doesn't teach it absolutely because he admits the possibility of patrimonial kingdoms where there is no self-determination of nations whatever.

Otherwise, that is a very difficult question. Do you want self-determination of the whole nation, or a part? We have a beautiful example: the Congo, of course. What about Katanga, whether or not [it has] the right of self-determination,[34] in contradistinction to the rest of the Congo?[xxxvi] International law surely doesn't give an effective answer to the question, we have seen that. Regarding this whole question of *ius naturale, ius gentium*, in chapter 20, paragraphs 9 to 10.

[xxxiii] In original, not "that the undivided sovereignty be transferred"; "that the undivided sovereignty may be transferred."

[xxxiv] "In order to validly alienate any part of the sovereignty there is need of a twofold consent" is written in the translation.

[xxxv] *JBP*, 3.20.5.2-3.

[xxxvi] The province of Katanga seceded from the Republic of Congo in July 1960, with Belgian support. UN forces recaptured Katanga province in December 1962.

Reader:

> Some make a broad distinction between property which belongs to citizens and the law of nations[xxxvii] and that which belongs to the same person by civil law;[xxxviii] in consequence they grant to the king a more unrestricted right over property owned under the law of nations, even to the extent of taking it away without cause and without compensation, while they admit no such right in the case of property held by the law of nature.
>
> This distinction is wholly erroneous—

LS: The right of nature? I think he speaks here only of the two—of civil law and of *ius gentium*, not of natural law.[xxxix]

Reader:

> This distinction is wholly erroneous, for ownership, no matter from what cause it has arisen, always has effects originating in the law of nature; consequently it cannot be taken away except as the result of causes which are inherent in ownership by its very nature, or arise from an act of the owner.[xl]

LS: In other words, natural right sanctifies property, whether acquired under the right of nations or under civil right.

Reader:

> Now this doctrine, that the property of individuals should not be given up except for the public advantage, has reference to the king and his subjects, just as the other doctrine regarding compensation for loss has reference to the state and individuals. The act of the king is in fact sufficient for foreigners, who make agreements with him, not only by reason of the presumption established by the dignity of his person, but also in accordance with the law of nations, which permits the property of subjects to be made liable by the act of the king.[xli]

LS: We see here again the tendency to distinguish natural right and the *ius gentium*. Paragraph 12, toward the end of the first section.

Reader:

> So also deserters will not be surrendered unless that is in the agreement. For we receive deserters by the law of war; that is, according to the law of war we are allowed to admit and enroll on our side the one who changes

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[xxxvii] In original, not "and the law of nations"; "by the law of nations."
[xxxviii] Kelsey has "municipal law." The reader substitutes the more literal "civil law."
[xxxix] Strauss is correct regarding the passage just read.
[xl] *JBP*, 3.20.9.1.
[xli] *JBP*, 3.20.10.1.

> allegiance. Under such an agreement the other things remain in the hands of the possessor.[xlii]

LS: The beginning of the next paragraph.

Reader: "In such cases, however, the word possession is understood not according to civil law but according to the law of nature.[xliii] For in wars the fact of possession suffices, and nothing else is considered."[xliv]

LS: "Civilly" or "naturally," which of course means according to civil law or according to natural law. According to Gronovius' interpretation, [possession under] civil law is those things which are acquired with a just title, and one possesses naturally those things which someone is said to hold, whatever the manner of getting possession of them warrants. So in other words, I'm not sure whether[35] [it's appropriate to] translate[36] [as] "natural right." "Naturally" in the same sense in which we distinguish natural children and legitimate children: in the same way, natural property and civil property. In the case of children, we know it has its place in natural right, because according to natural right the distinction between legitimate and illegitimate children does take place, as we have seen. So it may ultimately be correct to translate it this way. Paragraph 42.

Reader:

> The result of a war cannot in all cases be made subject to the chance of drawing lots, but only in those cases in which the issue is one over which we have full power. For the obligation of the state to protect the life, chastity, and other rights of its subjects, and of the king to protect the welfare of the state, is too great to permit the disregard of those considerations which stand in the most natural relation to the defense of themselves and others. Nevertheless, if on a careful estimate the party attacked in an unjust war is so far inferior that there is no hope of resistance, it is apparent that a decision by lot is offered,[xlv] in order that a certain peril can be avoided by recourse to an uncertain one.[xlvi]

LS: I wanted to read you this paragraph because he speaks here of the most natural *rationes*, considerations of states, in the hands of kings.

In the next chapter Grotius makes clear that the institution of armistice is based on *ius gentium*. Chapter 22, paragraph 9, section 2, second sentence.

Reader: "In such matters circumstances generally do not afford opportunity to request the decision of the sovereign authority."

[xlii] *JBP*, 3.20.12.1.
[xliii] Again, the reader is substituting civil law for municipal law.
[xliv] *JBP*, 3.20.12.2.
[xlv] In original, not "is offered"; "can be offered."
[xlvi] In original, not "can be avoided"; "may be avoided." The paragraph ends "This, in fact, is the least of the evils." *JBP*, 3.20.42.

LS: What is the question here? Read it from the beginning

Reader:

> However, it is quite within the power of generals to grant things which have not yet been taken, because in many cases towns and men surrender in war on the condition of preserving their lives, or of keeping also their liberty and even their property.[xlvii] In such matters circumstances generally do not afford opportunity to request the decision of the sovereign authority.
>
> For a like reason this right ought to be granted also to commanders not of the highest rank, within the limits of the matters entrusted to their administration.[xlviii]

LS: I think that is clear; now let us turn to the next section.

Reader: "Consequently, in the case of Rabirius we ought to consider Cicero as a lawyer and not as a judge."

LS: What a strange distinction, from a simple view of justice.

Reader:

> He maintains that Rabirius rightly killed Saturninus whom the consul Gaius Marius had persuaded to leave the Capitol by giving a pledge to him.[xlix] "How could a pledge be given," says Cicero, "without a decree of the Senate?"[l] And so he treats the matter as if that pledge bound Marius only.[li]

LS: Do you understand the issue? A higher cop had given a promise of safety, and then the cop in question killed that man to whom he had given the promise. And Cicero defends this man who has broken the promise, and Grotius says: Don't listen here to Cicero—here he is not speaking as a teacher of right, nor as a judge, but as an[37] [attorney], *i.e.*, he is compelled by his function to state the case for that murderer although it is a very[38] [wrong] case. That is quite interesting. This leads of course to a great question: What is the natural right basis for the fact that we have counsel for defense plead before the judge? I suppose the reasons are not very difficult to find. You want to have the case stated as strongly as possible, so that the judge is in a position then to make an impartial decision. It also shows that there is a closer kinship between the teacher—in this case Cicero—and the judge[39] [on the one hand, and the lawyer on the other]. The impartial judgment. Chapter 23, paragraph 7, section 2.

[xlvii] In original, not "and even their property"; "or even their property."
[xlviii] *JBP*, 3.22.9.2.
[xlix] In original, not "rightly killed"; "had rightly killed." The proper names are marked inaudible in the original transcript.
[l] Cicero, *For Rabirius* 10.28.
[li] *JBP*, 3.22.9.3.

Reader:

> Some writers declare such an agreement, that is the pledge not to return to a certain place or enter military service again,[lii] void because it is contrary to the duty due to the country of allegiance. But whatever is contrary to duty is not at once also void, as I have said just above and elsewhere. Then, too, it is not contrary to duty to obtain liberty for oneself by promising what is already in the hands of the enemy. The cause of one's country is, in fact, none the worse thereby, since he who has been captured must be considered as having already perished, unless he is set free.[liii]

LS: In other words, Grotius says that the conflict of duties does not arise in this case, but if it were to arise, something may be against the moral and yet be valid.[40] [I have used before the example of] the prodigal who makes gifts of superficial actions and yet the gifts are valid.

Let us turn to a few passages in chapter 25, the last chapter. Read the heading of the whole chapter completely.

Reader: "Conclusion, with Admonitions on Behalf of Good Faith and of Peace"[liv]

LS: Now let us read paragraph 1, section 3.

Reader:

> It is, then, all the more the duty of kings to cherish good faith scrupulously, first for conscience's sake, and then also for the sake of the reputation by which the authority of the royal power is supported. Therefore let them not doubt that those who instill in them the arts of deception are doing the very thing which they teach. For that teaching cannot long prosper which makes a man anti-social with his kind and also hateful in the sight of God.[lv]

LS: This is of course a very important statement, and here he joins the issue with Machiavelli. In Machiavelli, conscience is out, naturally, but what about fame? And since Grotius admits that fame is of great importance and in fact the support of royal authority, this is then the issue[41] [between] Machiavelli and Grotius. Does fame depend on keeping of faith?

But what about this point, that the teachers of perfidy are necessarily suspect of perfidy? If they say perfidy is all right, then it stands to reason that they might use perfidy. That is what Machiavelli says: the virtue of a prince consists in using virtue and vice according

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[lii] The phrase "that is the pledge not to return to a certain place or enter military service again" are not in the translation.
[liii] *JBP*, 3.23.7.2.
[liv] *JBP*, 3.25.
[lv] *JBP*, 3.25.1.

to circumstances—in particular, keeping of faith and breaking of faith, whatever is most profitable.[lvi] But how does Machiavelli meet that argument: that the counselor who advises perfidy can himself be suspected of perfidy, and therefore don't believe it will work, accept only the moral[42] [advice]? Machiavelli did discuss this: of course the prince cannot possibly trust his counselor, he must make him good and keep him good—good meaning loyal to him, and that partly by gifts and partly by having him watched by others.[lvii]

What about treachery[43] [applied] universally? There is a somewhat poetic discussion in the seventh chapter of *The Prince*: what Cesar de Borgia did in order to clean up the Romagna. These feudal barons who made life very miserable for the people there—Borgia had invited them to a roundtable conference. He had a kind of Himmler whom he used for the purpose, and when this fellow got too harsh and out of bounds, the next morning people awoke and saw that Himmler cut into four pieces in the market-place of Forli or whatever town it was.[44] [Completely] amazed, but surely obedient subjects of Cesar de Borgia.[lviii] Machiavelli would say treachery has of course such a bad reputation, but if it is done on a large enough scale and the results are beneficial enough, this will redound to the glory of that man. Let us read paragraph 2.

Reader:

> Again, during the entire period of administration of the war the soul cannot be kept serene and trusting in God unless it is always looking forward to peace.[lix] Sallust most truly said, "The wise wage war for the sake of peace."[lx] With this the opinion of Augustine agrees: "Peace is not sought that war may be followed, but war is waged that peace may be secured." Aristotle himself more than once condemns those nations which made warlike pursuits, as it were, their end and aim.[lxi] Violence is characteristic of wild people,[lxii] and violence is most manifest in war; wherefore the more diligently effort should be put forth that it be tempered with humanity, lest by imitating wild beasts too much we forget to be human.[lxiii]

[lvi] Niccolò Machiavelli, "Of Those Things for Which Men and Especially Princes Are Praised or Blamed," *The Prince*, trans. Harvey C. Mansfield (Chicago: University of Chicago Press, 1998), chap. 15.

[lvii] Machiavelli, "Of Those Whom Princes Have as Secretaries," *The Prince*, chap. 22.

[lviii] Remirro de Orco is the name of the "Himmler" figure in this story. Machiavelli says in chapter 7 of *The Prince* that he was cut in two pieces and placed in the piazza of Cesena, which made the people "satisfied and stupefied" (in Mansfield's translation). In another incident Borgia invited a number of rivals to a dinner conference and had them slaughtered.

[lix] In original, not "the war"; "a war."

[lx] The name is marked inaudible in the original transcript.

[lxi] Grotius here cites Sallust, *Speech 1 to Caesar*, Augustine, *Letter 1 to Boniface 207* and Aristotle, *Politics* VII.2, 7.14. See also *Politics* II.9.

[lxii] In original, not "people"; "beasts."

[lxiii] *JBP*, 3.25.2.

LS: Why does he say "Aristotle himself"? I think it means something like *ipse dixit*.[lxiv] Of course he does not mean here, even Aristotle, who other writers[45] know as such a lover of war, but we see here what an authority Aristotle still is. Paragraph 4.

Reader:

> This one consideration ought to be sufficient. However, human advantage also often draws in the same direction, first, those who are weaker, because a long contest with a stronger opponent is dangerous, and, just as on a ship, a greater misfortune may be avoided at some loss,[lxv] with complete disregard of anger and hope which, as Livy has rightly said, are deceitful advisors. The thought is expressed by Aristotle thus: "It is better to relinquish something of one's possessions to those who are stronger, than to be conquered in war and perish with the property.'[lxvi]

LS: Here he brings in utiliarian considerations, and there is a broad agreement between utility and humanity. We have mentioned this subject before. Since utility is the lower consideration, and since it can then be more easily expected from men, that they act upon utility [more] than on humanity, therefore one can say: Why not build the whole teaching, the whole natural law teaching, on utility and forget about humanity? That is in a way what Hobbes and Locke tried to do, because self-preservation is of course the principle of utility.

Student: Except that you said before, how much long-range utility . . . .

LS: The Greeks had a clear distinction. "Useful" is distinguished in[46] [two senses]: as a good (as we say, goods and services); [and] as distinguished from the noble and just. It is what we mean by the moral. What the Latins mean[47] by *honestum* is perhaps now better translated by honorable than[48] [by virtuous], because *honestum* is as it were only a section of morality which Grotius calls "right strictly understood." Surely in the seventeenth century already, honest was the lower. Hobbes says somewhere [that] honest and honorable mean the same thing in different human groups, meaning honorable is a word of the nobility and honesty is a word of the non-noble.

Now this broad agreement between utility and humanity is a condition for the efficacy of Grotius' admonitions. Is this not clear? If they go in different directions, then the admonitions to humanity will always be[49] [sacrificed] to the seeming recommendation of utility.

I think in order to remind you of the problem which we have to face, I would like to read to you a few passages from a contemporary of Grotius, this time Francis Bacon, from his *Essays*, the essay "Of Empire."

[lxiv] He said it himself, used to mark pronouncements from sources that are wholly authoritative.
[lxv] In original, not "may be avoided"; "must be avoided."
[lxvi] Grotius here cites Livy 7.40.19, and Aristotle's *Rhetoric to Alexander*, a work that is now widely thought not to be by Aristotle. *JBP*, 3.25.4.1.

Kings have to deal with their neighbors, their wives, and so on.

> First, for their neighbors [**LS**: that is the same problem today] there can no general rule be given (the occasions are so variable), save what whichever holds;[lxvii] which is, that princes do keep due sentinel that none of their labors do overgrow so[lxviii] (by increase of territory, by embracing of trade, by approaches, or the like),[lxix] as they become more able to annoy them;[lxx] and this is generally the work of standing counsels to foresee and to hinder.[lxxi] During that triumvirate of kings, King Henry the Eighth of England, Francis the First, King of France, and Charles the Fifth, Emperor, there was such a watch kept that none of the three could win a palm of ground but the other two would straightways balance it, either by consideration,[lxxii] or if need be, by war;[lxxiii] and would not in any way false take up peace and interest[lxxiv][**LS**: as opposed to[50] [continuing the war].] Neither is the opinion of some of the schoolmen to be received, *that a war cannot justly be made by but upon a precedent, injury or provocation*[lxxv] [**LS**: Grotius is of course a schoolman] for there is no question but a just fear of imminent danger,[lxxvi] though there be no blow given, is a lawful cause of war.[lxxvii]

That is one point. Now I read you a few more. Another essay on the true greatness of kingdoms and estates. Estates means states.

> above all, for empire and greatness it is important most,[lxxviii] that a nation to possess arms as their principal honor, study, and occupation;[lxxix] for the things which we formerly have spoken of are but habilitations towards arms, and what is habilitation without intention and act? Romulus, after his death,[lxxx] sent a present to the Romans, that above all they should

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[lxvii] In original, not "what whichever"; "one, which ever."
[lxviii] The words "due sentinel" are marked "[inaudible] sentiment" in the original transcript. Not "labors"; "neighbors."
[lxix] The words "increase" and "trade" are marked inaudible in the original transcript.
[lxx] In original, not "more able to annoy them"; "more able to annoy them than they were."
[lxxi] In original, not "and to hinder"; "and to hinder it."
[lxxii] In original, not "consideration"; "confederation."
[lxxiii] In original, not "or if need be"; "or if need were."
[lxxiv] In original, not "not in any way false"; "not in anywise." Not "take up peace and interest"; "take up peace at interest."
[lxxv] In original, not "cannot justly be made by"; "cannot justly be made."
[lxxvi] In original, not "imminent danger"; "an imminent danger."
[lxxvii] In original, not "cause of war"; "cause of a war." Francis Bacon, "Of Empire," in *The Essays, or Counsels, Civil and Moral, of Francis Bacon*, ed. Samuel Harvey Reynolds (Oxford: Clarendon, 1890), 129-35, see esp. 132-33.
[lxxviii] In original, not "it is important most"; "it importeth most."
[lxxix] In original, not "that a nation to possess"; "that a nation do profess." The words "as their" are marked inaudible in the original transcript.
[lxxx] Bacon here inserts parenthetically "(as they report or feign)."

intend arms, and then they should prove that they are the empire of the world.[lxxxi] The fabric of the state of Sparta was wholly (though not wisely) trained and composed to that scope and end;[lxxxii] the Persians and Macedonians headed for a flash;[lxxxiii] the Gauls, Germans, Scots, Saxons, and Normans, headed for a time;[lxxxiv] the Turks have it at this day, though in great declination.[lxxxv] it is a most certain oracle of time, that those states who continued long in that profession (as the Romans and Turks principally have done) do wonders;[lxxxvi] and those who have professed arms but for an age have, notwithstanding, commonly attained that greatness in that age which maintained them long after, when their profession and exercise of arms had grown to decay.[lxxxvii]

Incidence for this point is for a state to have those laws or customs which may reach forth for them into just occasions (as may be pretended) of war;[lxxxviii]for there is that justice imprinted in the nature of men, where they enter upon wars (where so many calamities ensue) but upon some at least specious grounds and quarrels.[lxxxix]The Turk has at hand, for cause of war, provocation of his law or sect, a quarrel that he may always command.[xc]The Romans, though they esteem the extending the limits of their empire to be great honor to their generals,[xci] yet they never rested upon that alone to begin a war: first therefore let nations that pretend to greatness have this, that they be sensible of wrongs, either upon borderers,

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[lxxxi] In original, not "they should prove that they are the empire of the world"; "they should prove the greatest empire of the world."

[lxxxii] In original, not "trained"; "famed." The words "to that scope and end" are marked inaudible in the original transcript.

[lxxxiii] In original, not "headed"; "had it." The words "a flash" are marked inaudible in the original transcript.

[lxxxiv] In original, not "the Gauls, Germans, Scots, Saxons, and Normans, headed for a time"; "the Gauls, Germans, Goths, Saxons, Normans, and others, had it for a time." The words "a time" are marked inaudible in the original transcript.

[lxxxv] The words "have it at this day" are marked inaudible in the original transcript. An additional text intervenes at this point in Bacon but not in the original transcript: "Of Christian Europe, they that have it are, in effect, only the Spaniards. But it is so plain *that every man profiteth in that he most intendeth*, that it needeth not to be stood upon. It is enough to point at it; that no nation which doth not directly profess arms may look to have greatness fall into their mouths. And on the other side."

[lxxxvi] The words "it is a most certain oracle of time" are marked inaudible in the original transcript. Not "who continued"; "that continue." The word "wonders" is marked inaudible.

[lxxxvii] In original, not "and those who have professed arms"; "and those that have professed arms." The words "when their profession and exercise of arms had grown to decay" are marked inaudible in the original transcript.

[lxxxviii] "Incident to" begins the paragraph in Bacon. In original, not "which may reach forth for them into"; "which may reach forth unto them."

[lxxxix] Bacon has "for there is that justice imprinted in the nature of men, that they enter not upon wars (whereof so many calamities do ensue) but upon some at the least specious grounds and quarrels."

[xc] In original, not "provocation of his law or sect"; "the propagation of his law or sect."

[xci] In original, not "honor to their generals"; "honor to their generals when it was done."

> merchants, or politic ministers;[xcii] and that they sit not too long upon a provocation: secondly, let them be prest and ready to give aids and support to their confederors;[xciii] as it ever was with the Romans; insomuch as if the confederates had leagues defensive with divers other states, and upon invasion offered did implore their aids severally,[xciv] yet the Romans would ever be the foremost and leave it to none other to have the honor.[xcv] As for the wars which were anciently made on behalf of a kind of party[xcvi] [**LS**: international civil war, "or tacit conformity of state," meaning of regimes] I do not see how they may well be justified: as when the Romans made a war for the liberty of Greece, or when the Lacedaemonians[xcvii] and the Athenians made wars to set up or pull down oligarchies:[xcviii] or when wars were made by foreigners, under the pretense of justice or protection, to deliver the subjects of others from tyranny and oppression.[xcix] Let it suffice, that no state expect to be great that is not awake upon any just occasion of arming.
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> No body can be helpful without exercise, neither natural body nor politic;[c] and certainly to a kingdom of states a just and honorable war is the true exercise.[ci] Civil war indeed is like the heat of fever;[cii] but a foreign war is like the heat of exercise, and serves to keep the body in health.[ciii]

So these are two older positions taken in the same age: the political consideration is paramount in Bacon and is so to speak absent from Grotius, and vice versa, but one has to take into consideration both things, the Grotian point of view and the Baconian point of view, that this difference occurs in every age.

Student: It seems that Bacon's point of view is quite compatible with Plato's.

LS: This passage regarding civil war and not helping against tyrants and no intervention into[51] domestic affairs is directly[52] [the opposite] of Thomas More's proposals in the

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[xcii] Marked inaudible in the original transcript are the words "upon borderers, merchants, or politic ministers."
[xciii] In original, not "support"; "succours." Not "confederors"; "confederates."
[xciv] Marked "[inaudible] . . ." in the original transcript are the words "had leagues defensive with divers other states, and upon invasion offered did implore their aids severally."
[xcv] Marked "[inaudible] . . ." in the original transcript are the words "and leave it to none other to have the honor."
[xcvi] The word "anciently" is marked inaudible in the original transcript. Not "made on behalf"; "made on the behalf."
[xcvii] "Lacedaemonians" is marked inaudible in the original transcript.
[xcviii] In original, not "to set up or pull down oligarchies"; "to set up or pull down democracies and oligarchies."
[xcix] In original, not "tyranny and oppression"; "tyranny and oppression; and the like."
[c] In original, not "helpful"; "healthful."
[ci] In original, not "a kingdom of states"; "a kingdom or state."
[cii] "A civil war" are the first words of the sentence in Bacon. Not "the heat of fever"; "the heat of a fever."
[ciii] Bacon, "Of the True Greatness of Kingdoms and Estates," in *Essays*, 202-13, esp. 209-11.

Utopia.[civ] Bacon's statements also differ from Machiavelli's, and this didn't come out in what I read to you: Bacon believes in navies. Machiavelli is wholly silent on navies, although he wrote in a way the history of the Roman Empire, which you know didn't come into being except by naval successes against the Carthaginians. Bacon is surely the theorist of the present empire. But apart from these peculiarities, the key question is the absence of these [moral] considerations.

The question is stated: What would happen to the human race without war? This is a great question. If we look back, it is easy to see how much misery has been due to war.[53] [People tend to forget] the good things which are due to war. And it is a great question whether this is a mere accident due to the ignorance of man, or whether there is something deeper in man which leads to that.

Student: I'm not sure it is justified that war is healthy. A country may as well have a physical fitness program.

LS: But still, the problem is not completely[54] [solved by that]. I do not know whether you know the study by William James. I think it's on the moral substitute for war, because[55] mere physical fitness is of course not meant, that is clear,[cv] but the other things: the element of danger is not in physical fitness programs, and sacrifice, and the kind of enthusiasm which men have more for this kind of thing than for others. I mean, say, the war against poverty does not arouse the kind of enthusiasm as a war against Japan does.

At any rate, I thought it was fit to remind ourselves at the end of this course about the other side of this question which Grotius knows but from which he deliberately abstracts.

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[1] Deleted "[inaudible]."
[2] Deleted "and regarding."
[3] Deleted "[inaudible]."
[4] Deleted "identify."
[5] Deleted "the."
[6] Deleted "in Socrates'."
[7] Deleted "side."
[8] Deleted "absolutely."
[9] Deleted "[inaudible]."
[10] Deleted "[inaudible]."
[11] Deleted "and."

[civ] See More, *Utopia*, Book 2, chapter 8, "Of Their Military Discipline" (available at http://etext.lib.virginia.edu/toc/modeng/public/MorUtop.html)
[cv] William James, "The Moral Equivalent of War," in *Writings 1902-1910* (New York: Library of America, 1987), 1281-93. This essay was also alluded to by Strauss in session 10.

[12] Deleted “allegiances.”
[13] Deleted “underlined.”
[14] Deleted “views.”
[15] Deleted “use.”
[16] Deleted “intendia.”
[17] Deleted “of.”
[18] Deleted “against; it’s even.”
[19] Deleted “if.”
[20] Deleted “[inaudible].”
[21] Deleted “is.”
[22] Deleted “which.”
[23] Deleted “is.”
[24] Deleted “that.”
[25] Deleted “about.”
[26] Deleted “[inaudible].”
[27] Deleted “punishing.”
[28] Deleted “the.”
[29] Deleted “[inaudible].”
[30] Deleted “still.”
[31] Deleted “so we do.”
[32] Deleted “the.”
[33] Deleted “The.”
[34] Deleted “of Katanga.”
[35] Deleted “[inaudible].”
[36] Deleted “by.”
[37] Deleted “[inaudible].”
[38] Deleted “long.”
[39] Deleted “[inaudible].”
[40] Deleted “[inaudible].”
[41] Deleted “within.”
[42] Deleted “[inaudible].”
[43] Deleted “[inaudible].”
[44] Deleted “[inaudible].”
[45] Deleted “we.”
[46] Deleted “a new sense.”
[47] Deleted “now.”
[48] Deleted “valorous.”
[49] Deleted “settled.”
[50] Deleted “[inaudible].”
[51] Deleted “the.”
[52] Deleted “[inaudible].”
[53] Deleted “[inaudible].”
[54] Deleted “exacerbated.”
[55] Deleted “the.”